
ADR Issues

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Interview with United States Attorney Mark Calloway



In 1983, Mark T. Calloway began his legal career as a law clerk to the Honorable Robert D. Potter, then Chief United States District Judge for the Western District of North Carolina, and

later as a law clerk and research assistant to the Honorable Jack L. Cozort at the North Carolina Court of Appeals. He joined the Charlotte law firm of James, McElroy and Diehl, P.A. in 1987. Eventually becoming a partner/shareholder, he represented Richard W. Dortch in the PTL scandal case.

Mr. Calloway was appointed United States Attorney for the Western District of North Carolina in 1994. In December 1997, he was appointed to the Attorney General's Advisory Committee (AGAC). He became Chair of the AGAC in August 1999.

Mr. Calloway (MC) was interviewed by David Nissman (DN), Editor-In Chief of the United States Attorneys' Bulletin.

As this edition of the United States Attorneys' Bulletin was going to press, Mr. Calloway was appointed by the Attorney General to serve as the Director of the Executive Office for United States Attorneys (EOUSA), a position that he will assume in November 2000, upon the departure of present Director Mary H. Murguia, who has been appointed by the President to serve as a United States District Judge for the District of Arizona. Mr. Calloway will continue to serve as the United States Attorney for the Western District of North Carolina during his term as Director of EOUSA. United States Attorney B. Todd Jones, District of Minnesota, has been appointed by the Attorney General to serve as the new Chair of the AGAC.

DN: When did you become interested in becoming a federal prosecutor?

MC: From the time I first started clerking in federal court, I always wanted to be a federal prosecutor. At that time I couldn't convince the United States Attorney to hire me and, looking back on it, I wouldn't have hired me either, being right out of law school. So, I found a way to get my foot in the door. I mean, if you can't be an AUSA, then being a United States Attorney is the next best thing.

DN: Have you enjoyed your experiences in the office?

MC: I have immensely. Not a day goes by that I don't get up and look forward to coming to work.

DN: When you first started you assigned yourself some cases. Did any go to trial?

MC: Yes. I tried an 18 U.S.C. § 876 case in the mountains involving some serious threats through the mail. A woman left her husband due to physical abuse. She was a nurse at a medical clinic and he showed up there one morning with a knife, stabbed her eleven times and left her to die. He flicked the knife in her stomach as she was laying on the floor begging to die in peace. He was charged in state court and got ten years for assault with a deadly weapon, but under state law would only serve three years. While serving his sentence he wrote her over ninety letters, most of which were threatening. We're talking really foul stuff.

To the credit of an FBI agent and an AUSA in my office, this lady got our attention. She couldn't get anybody at the state level to help her. She said "this guy's gonna kill me when he gets out." Consequently, we charged him with 12 counts of sending threats through the mail. I worked it up, tried the case and we ended up with an eight minute jury verdict on all counts. I asked for an upward departure of 18 levels. The judge didn't go exactly the way I asked him to go, but he granted an 18 level departure and the defendant is

essentially doing a life sentence (60 years - which was affirmed on appeal). It was one of those cases where you knew the guy's intent. He was going to kill her. He tried once and wasn't successful, so we used all that evidence against him to get an enhanced sentence under the guidelines. She is now safe from him for the rest of her life.

DN: You've made white collar crime cases a priority in your office. Why?

MC: For the public to maintain confidence in our legal system, white collar crime must be prosecuted. When I got to the office in February 1994, we had, at most, one and one-half attorneys working white-collar crime. We were primarily prosecuting violent crime and narcotics cases. When we get new resources, we usually put them in white collar to try and achieve a balance of prosecution among white collar, drugs, and violent crime.

DN: Do you still prosecute a lot of drug cases?

MC: Yes. And you can't prosecute white-collar crimes at the expense of violent crime and drug crime. The ability of a small office to prosecute white-collar is a luxury. You have to keep the drug and violent crime programs strong, but when new resources come along, whether it is an ACE position, or healthcare fraud, or some other position that we can devote to white collar, we have tried to do that. We have made a conscious effort to build up the white-collar side of the house because that was where we were deficient, and there were a lot of good white-collar cases that we couldn't pursue. Now we are revising our declination guidelines and prosecuting more serious white collar cases including computer crime. The FBI in the Charlotte area has a regional computer squad now, so we have to have trained AUSAs to service those cases. It doesn't do the FBI any good to have the regional squad if the U.S. Attorney's Office doesn't have the skills or the resources to prosecute computer crime cases.

DN: When you said changing your guidelines - you're talking about selecting out cases from a larger group and prosecuting the most significant

ones. Do the local prosecutors pick up the other cases?

MC: Unfortunately no. You simply can't do every case. There are too many. Doing a larger case means there are going to be smaller cases that you just can't prosecute. For example, bank teller-embezzlements, and cases of that nature will have to be fast-tracked or they can't get prosecuted. The local district attorneys in my district have their hands full with property crimes and violent crimes. When we took a look at the smaller cases we realized that because of the lenient way the Sentencing Guidelines treat white collar crime, we were getting a probationary or, at best, a split sentence after a lot of hard effort by our prosecutors and agents. There is not much deterrent value in probation. We need to move on and do bigger impact cases as opposed to the smaller stuff.

DN: Give us an example. What do you mean by bigger or more important cases?

MC: Several years ago we prosecuted a fairly complex eleven million dollar bankruptcy fraud case. Basically, the defendant was lying about his assets and using money that he received through people investing in hotels for his personal use including the purchase of a helicopter and a boat. He was sentenced to about 9 years. This is a very significant white collar sentence. I thought it was very worthwhile and the bankruptcy community thought it was a case that needed to be pursued and they were glad to see that we did it. Recently, we have been getting matters involving fraud ranging from \$100,000 to \$30 million dollars. Those cases are complex and take time, but should take precedent over smaller dollar cases, particularly when they have numerous victims.

If you are looking to have an impact on the business community and to let them know this kind of conduct is not acceptable, then I think you can have a greater deterrent effect with each significant case - if you pick your cases carefully.

DN: You are very interested in management technique and are a frequent lecturer in the OLE attorney managerial courses. Tell us a little bit

about your management philosophy. How do you empower your AUSAs to use all their energy and creative talent to pursue good cases while at the same time creating internal controls that don't result in micro-management?

MC: That's a good question. It's probably best to ask my AUSAs. My job is to be the office cheerleader. That's the way I look at it. I work for the AUSAs in a sense. It is my job to make sure they have the resources, skills, and the equipment they need to get their job done. I go to bat for them when they need me because I want them to go to bat for me — it's a two-way street there. You can't expect your AUSAs to be loyal to you if you are not loyal to them. But I also have to take a broader view. AUSAs, like an agent, generally are worried about their case. They want to make sure they have developed sufficient evidence and, if appropriate, that they can get it indicted and get a conviction. Because of the position they are in, sometimes they may not see the bigger picture of how that case or the position they are taking on a particular point of law may affect other cases in the office or the rest of the country. I have a better perspective of that now because of the work I do on the AGAC. The main thing in my job is to protect my AUSAs when they are right; to make sure they have the equipment they need and that they have the skills and the training, and everything else they need, to get their job done. I also have an open-door policy. It is a small office, so I have the advantage of knowing everybody by name, and being able to visit with them by trolling the office. I have good people so it has made my job easier.

DN: What is your approach to getting agencies to work together?

MC: It is important to send the message early on that law enforcement works best when it works together. There is plenty of work to go around. Turf and agency battles can get really silly. North Carolina has a pretty good reputation with respect to law enforcement cooperation. We don't always agree, but we solve our disagreements in private; we don't air them publicly. You can get mad at each other every now and again, but like a family, you make up and you go on. We just try to send

the message from the top down with the other SACs and ASACs and RACs, as well, that we need to work together. Coming from a small district with scarce resources, we all benefit from this approach. As the United States Attorney, I try to make sure that everybody that needs credit or wants credit gets credit on a case. I have found that street or line agents from different agencies work together really well. It is when the mid-level supervisors start snipping at one another and start worrying about protecting their turf that things go wrong. All the agency heads have to show good leadership. Agents take the lead on attitude from their supervisors.

DN: Have you had some success with this?

MC: I think so. We have a good group of people. It's a challenge when SACs and ASACs rotate in and out frequently. I'm working with my fourth FBI SAC, fourth ATF SAC, third Secret Service SAIC, third Chief Postal Inspector, and fourth DEA RAC. Come to find out, having been there over six and a half years now, I have more seniority in the District than any other of the other law enforcement agency heads. It's kind of scary when I'm the old guy on the block in terms of experience in the district.

DN: Does that help in terms of getting the agency heads to follow your lead?

MC: Yes. You get a certain amount of credibility coming in with the title United States Attorney, but to keep it, you have to be reasonable and be willing to work with others. You have to show everybody else you are willing to work for them, do what's best for the case, and that you will stand up for their agency when it's the right thing to do.

DN: When you began your tenure as United States Attorney, how did you see the role of the U.S. Attorney and has it changed at all?

MC: Well, I had certainly hoped to be able to try more cases, but with my workload and travel schedule, it's simply not possible. It has probably changed some. I came in and tried to take a look at what was going on in the district. If you break the

crime problems down, they generally fall into three or four categories: narcotics, violent crime, white collar crime, and then you can have an “other” category of miscellaneous offenses. You really have to strike a balance and figure out where you can have the most impact. There is no point in duplicating resources with the local prosecutor. If they have a good handle on certain types of cases and can have a greater impact, then reserve your resources for something you can do that local prosecutors can’t. One of those areas is white collar crime. The role of the prosecutor has also expanded during my tenure. We are more involved in the community than we were six years ago. I think that is a good thing for a U.S. Attorney to do and for his or her office to do. It builds credibility with the community, which has the added benefit of making your job easier to do.

DN: How do you strike the proper balance between litigation, community outreach and the other aspects of the role of federal prosecutors?

MC: If you look at our mandate in the statutes, our core mandate is to represent the United States in criminal and civil cases in federal court. While our criminal prosecutors receive most of the public attention, our civil attorneys are also an important and valued component of our office. You don’t hear as much about them because their cases are long-term and complex and they don’t always get the media attention they deserve. On the criminal side, I believe in aggressive prosecution, but also in good prevention programs, because it is much better to prevent a crime than it is to prosecute one after the fact. You save someone from being a victim if you do that. We’ve got to train our prosecutors and agents in new areas of the law and new techniques essential to the office’s function – chiefly in the computer crime area. Finally, we have to anticipate the future. There are four components to a competent prosecution program: aggressive prosecution, prevention, training, and knowledge of the future. That is the way it’s evolved over the last five or six years for me. With some on-the-job experience, I began to realize that these four components are largely what we should focus on, and the community involvement goes both with prosecution and with prevention. If you

have credibility with the community, then they are more likely to refer cases to you, and support your prosecution and prevention efforts, particularly in the areas of violent and drug crime where the witness and the defendant may live in the same neighborhood.

DN: How did you become interested in serving on the AGAC?

MC: Actually, I got interested in doing committee work. I served on a variety of AGAC subcommittees and then became co-chair of the white collar crime subcommittee which fit nicely with my interest in white collar crime. From there I just kept getting asked to do different things. It’s a fairly short flight for me from Charlotte to Washington – 50 minutes once you get in the air. I found myself in Washington more and more doing committee work and different things. My office was running pretty well and I became interested in the work that various AGAC subcommittees were doing. Now I’m in Washington for a day or two almost every week.

DN: The AGAC is called the Attorney General’s Advisory Committee. The title suggests that you have a group of U.S. Attorneys who are advising the Attorney General about various matters. How does it work in reality? What is the purpose and function of the AGAC?

MC: It has several functions. We work for the Attorney General and we represent the interests of the United States Attorneys. So our job is to advise the Attorney General and the Deputy Attorney General on issues that they ask our opinion on and to give our recommendations on topics we think they need to know about. It is not an elitist organization. My view is, that as Chair of the AGAC, I also work for the other United States Attorneys. My job is to see that issues they think are important and that affect them get presented to the rest of the committee and that we look out for the United States Attorney community, which includes AUSAs. If topics slip through the cracks and something happens that we should have taken a look at that we didn’t, then that is probably my fault. So I need to keep working hard to make sure

that doesn't happen. Currently, the committee consists of 18 United States Attorneys representing a cross-section of office sizes and geographical regions of the country. We meet for two days, once a month in Washington, to discuss a variety of issues. There are more than twenty subcommittees and working groups that report to the AGAC and handle a lot of the work as well. What we try to do, if there is enough time, is to filter an issue in front of the subcommittee or subcommittees that have an interest in it and ask them to make a recommendation to the group so that the AGAC can pass off on it. We also act as the liaison between the rest of the Department and United States Attorneys on issues of mutual concern.

DN: How does the agenda get set?

MC: Topics come from a variety of sources including the Executive Office, from Mary Murguia, Jim Santelle, or Lynne Halbrooks, or the lawyers on detail up there. Committee members also suggest topics as do the Deputy Attorney General, the Attorney General and the heads of the litigating divisions. Judy Beeman, who is the AGAC Liaison, and is terrific, organizes our agenda. We start working on an agenda a month or two in advance. If there is something that a United States Attorney wants the AGAC to consider, then we take it up or we send it to a subcommittee to take up.

DN: What things would you like to bring to the AGAC's attention?

MC: I continue to believe that United States Attorneys are in the best position to know what is best for their district. They live there, they know their resources, and they have the best sense of what is going on in their community. There is a healthy tension between Main Justice and United States Attorneys because Main Justice has a Washington-perspective and we have a field-perspective. One thing I have tried to do (and I hope, in a gentlemanly way), is say that appropriate deference needs to be given to United States Attorneys when it comes to addressing crime problems in their districts. Prosecutors in the field, however, need to be mindful that for

Washington to repose trust and confidence in the U.S. Attorneys' offices, we all must act in the best interest of the United States on civil and criminal matters arising in our respective districts. Fortunately, we have an Attorney General who listens to the concerns of prosecutors in the field. Main Justice sets broad policies and we help carry them out, but there needs to be flexibility in every office as to what is best for the district based on its crime problem, its resources, local knowledge of the community, etc. On the other hand, Main Justice has a legitimate national interest in policy matters that affect the country. I think that is good because we both benefit from the other's perspective.

DN: Tell us about two or three issues that you think are significant, that you think AUSAs would be interested in hearing and that are on your radar screen.

MC: Computer crime and training of AUSAs and agents regarding computer crime is an area of concern to the AGAC. I'm not just talking about hacking cases, but cases that involve the use of the computer. I think we are behind the curve and we need to continue to work to catch up. We are a little ahead of the defense bar on it, but we really need to devote significant resources to that area to make sure that agents know how to search and seize computers and track evidence, and that AUSAs know how to try those types of cases. More and more you are going to see in drug and white collar cases, and other areas, the use of computers. They are here to stay. We have to be prepared for that. Another issue that I would like to see us work on and resolve, and I don't know if we will in the short term, is the 28 U.S.C. § 530B problem.

DN: Please elaborate.

MC: I think prosecutors have taken an unfair beating on this issue. We need to do a better job of educating Congress, the state bars, and the ABA on what it is we do and why what we do is different from the average lawyer. We are enforcing federal law, and you need to set aside philosophical differences between what a defense

lawyer thinks you ought to be able to do and what the law allows you to do. The two are not necessarily the same. I have been a defense lawyer so I have a perspective from that area as well. It is just fundamentally unfair to AUSAs to subject them to conflicting state bar rules, however, and then ask them to do their job. We have to try to find a way to resolve this issue. We must remember though that we have an obligation to act with the highest ethical standards. Anytime you push the edge of the envelope in a case you run the risk that something will snap back and bite you. We would do a great service to the AUSAs across the country if we worked hard to resolve this issue.

DN: You've had the opportunity to meet many AUSAs through your work with the AGAC. What is your view of the quality of AUSAs nationally?

MC: We have some of the most hard-working, loyal, competent, and ethical lawyers across the country. The good thing about working in the U.S. Attorney's Office is that you get to do what you think is right. You get to do justice.

DN: It is an important motivator.

MC: I know that AUSAs have the best interests of the case at heart. Although they've worked hard on their cases, they don't have a personal interest in them. It is one of the few places in the practice of law where you get to do absolutely what you think is right. You get to act based on what is right, just, and ethical. That is a great way to practice law. It is one of the things, when it is my time to go, that I will miss about the office. I hope wherever I land next, the folks will be as ethical and as hard working as the staff I have now. If I didn't have a good office and good people I couldn't go do the things I do in D.C.

DN: Based on your experience as a United States Attorney, what kinds of things would you like to do in the future?

MC: I'm not sure what the master plan is yet. I still enjoy the practice of law, though what I do now is not line attorney work. I enjoy management and getting to work with people from all walks of life, and I like the law. Ideally, it would be nice to combine those things. At some time in the future, I'd like to be able to return to public service, which I greatly enjoy. ~

The Dispute Resolution Program at the Department of Justice: How Our Lawyers Are Using Mediation to Represent the United States More Effectively

*Peter R. Steenland, Jr.
Senior Counsel for ADR
Office of Dispute Resolution*

When Attorney General Janet Reno began the "Appropriate Dispute Resolution" program for

civil litigators five years ago, a common response by many of our lawyers was polite but firm skepticism. "Thanks, but we really don't need ADR because we already settle most of our cases." Today, vestiges of this attitude linger to some degree, but the Department's use of ADR has quadrupled from five

years ago to more than 2,000 cases in the last fiscal year. How can this rapid growth be explained?

Courts are asking litigants to make greater use of ADR

First, this rapid increase in ADR – and mediation in particular – is due in part to factors beyond our control. ADR is no longer an “alternative”, but rather is an integral part of a growing number of federal court civil litigation programs. With the passage of the Alternative Dispute Resolution Act of 1998, in which Congress directed all federal courts to establish ADR programs, continued growth in ADR usage by the Federal Government became inevitable. Every federal appellate court now has an ADR program. Many government cases on appeal have been selected for mediation by the courts’ cadre of expert mediators. In district courts, some existing programs are being expanded and new programs are coming on line in other jurisdictions. Magistrate judges are being trained in mediation skills, and the traditional settlement conference is sometimes supplemented with a “real” mediation in which the Magistrate Judge actually meets in caucus with each party in an effort to negotiate a settlement. While some districts are experimenting with other ADR processes such as Early Neutral Evaluation, most growth has come in the process that is most congenial to government litigation – mediation. For all of these reasons, some of the growth in the ADR program can be attributed to decisions by courts and ADR program administrators to submit our cases to dispute resolution processes in their courts.

Using a mediation to negotiate more intelligently

A second factor explaining this explosion of ADR activity has to do with the pro-active use of ADR by government counsel, based on the recognition that mediators can make settlement negotiations more productive and less time consuming. Increasingly, our attorneys understand that using a skilled mediator often enables them to reach closure more quickly than by engaging in one-on-one negotiations with opposing counsel. Our lawyers are using mediators to deal with the

emotional baggage -- anger, frustration, and hostility -- that so often make settlement negotiations protracted and painful. Similarly, skilled mediators are far more effective than we are in disabusing opposing parties from their “jackpot” expectations. Mediators can also create a safe environment in which opposing counsel and their clients are encouraged to candidly examine the stark and practical consequences of going to trial against the United States, should settlement efforts collapse.

All too often, our lawyers craft eminently fair and reasonable settlement proposals, only to see them dismissed out-of-hand by our opponents. These rejections are vexing because, in most cases, our adversaries are not responding to the quality of the settlement we proposed. Instead, they are responding adversely simply because they don’t trust the government to be fair. Many rejections of these well-balanced proffers are grounded upon the misguided conviction that any offer good enough for the government to make is, by definition, inadequate to the other side’s needs. Consequently, the bargaining, haggling, and posturing continues until a begrudging settlement is finally hammered out on the courthouse steps on the eve of trial. This is unfortunate because these inefficient negotiations have wasted far too much time. Moreover, we now know that terms far better than those reached on the courthouse steps could have been agreed to earlier, with far less rancor and suspicion, if the parties had used a neutral to make their negotiations more efficient.

Increasingly, our attorneys are dealing with this conundrum by entrusting mediators with the responsibility for conveying proposals and counterproposals in negotiations. When we rely upon the mediator to convey proposals and counterproposals, the parties cannot identify the source of the offer and are, therefore, unable to discount it. Mediation makes negotiation more efficient. Because there is no way to determine the origin of settlement proposals conveyed by a mediator, the parties are forced to evaluate those proposals on their own terms. In reality, the terms of a proposed settlement may be properly attributed to the other side, or instead may be nothing more than a concept “floated” by the mediator to gauge how far apart the parties remain in their positions. However,

because the parties cannot determine ownership of these offers, the negotiations can be conducted far more efficiently.

Using a mediator to find interests that can be addressed in settlements

The third factor driving the growth of ADR at the Department of Justice is the recognition by our lawyers that settlements occur when we go beyond the “positions” of the parties as articulated in their legal briefs and, instead, negotiate resolutions that address the parties’ underlying interests. In other words, although “positions” – the crisp articulation of a party’s legal argument -- will control the outcome of a case if presented to the court, the ability to identify and then address a party’s “interests” will drive the terms of most negotiated settlements. In unassisted negotiations, it is often extremely difficult to move the settlement talks from a discussion of positions to a candid examination of interests. Here, too, the skilled mediator can use private caucuses with the parties and their counsel to confidentially explore their interests. Armed with this information, the mediator then can use additional confidential private caucuses to discuss with each party whether there is any willingness to address the interests of the other side. For example, many plaintiffs have a strong desire for an apology or a change in whatever practices are alleged to have injured them. In mediation, once the plaintiff’s interests are identified, the defendant has the opportunity to satisfy them. By identifying items of non-economic value that could be included in a settlement, the mediator presents the defendant with the opportunity to reduce the level of monetary relief that the plaintiff would otherwise demand. In many cases, the interests identified by the parties bear little resemblance to positions their attorneys have advocated or to the nature of the relief that a court can provide. Thus, mediation can make the settlement negotiation more efficient because it encourages closure on terms that are more important and more acceptable to both sides. See the related article on the use of mediation to resolve medical malpractice suits.

Dispute Resolution as creative problem solving

Finally, we are seeing a growth in ADR because these are processes wholly compatible with our professional obligations to the courts and to the citizens whom we ultimately serve. By facilitating faster settlements, mediation allows us to devote more time and resources to those matters that cannot or should not settle. Mediators who can construct creative settlements based on the interests of the parties give those parties more reason to be satisfied with the judicial process. As the Attorney General regularly reminds us when speaking on the subject of resolving civil litigation, our diligent and vigorous advocacy on behalf of the United States should always be exercised in a way that combines a maximum amount of respect for our opponents and a minimum amount of adversity for the process used to resolve the dispute. Promoting creative problem solving, mediation and other forms of dispute resolution allow us to stay in control of the negotiations while generating creative settlements that may otherwise escape our knowledge. Truly, this is a “user-friendly” process that enables us to represent the United States more effectively in a wide array of civil litigation. ~

ABOUT THE AUTHOR

Peter R. Steenland, Jr. joined the Department of Justice in 1970 as a staff attorney in the Appellate Section of the Environment and Natural Resource Division. From 1978 until 1995, he served as the Chief of the Appellate Section in that Division. Since 1995, he has been the Senior Counsel for ADR in the Office of Dispute Resolution. Mr. Steenland has received the John Marshall Award for Appellate Advocacy in 1986, the Attorney General's Award for Distinguished Service in 1995, and the Presidential Award for Distinguished Service in 2000. His articles on dispute resolution have appeared in the "University of Toledo Law Review", "Consensus Magazine", "Alternatives Newsletter", and the "Dispute Resolution Magazine" of the American Bar Association. [a](#)

Frequently Asked Questions about ADR

Jeffrey M. Senger
Deputy Senior Counsel for Dispute Resolution

The following are the questions most frequently asked about ADR, along with answers.

What are good cases for ADR?

ADR is appropriate for most cases, but the following are particularly good cases for ADR:

Unassisted negotiation is not working. Obviously, if you are successfully negotiating without a mediator, don't bother with ADR. If negotiations are breaking down, though, consider it.

Your opponent needs a reality check. For example, if you have a plaintiff who believes he's going to retire rich at age 25 off the settlement from his soft tissue injury, a mediator can be helpful in convincing him otherwise. Often opposing parties do not believe things you say because they think you are biased. If they hear it from the mediator, they are more likely to negotiate seriously.

Opposing counsel is not passing along your settlement offers. Perhaps counsel is conveying your offer to the client in a way to make it sound unappealing. Mediation gives you an opportunity to talk directly to the other side's client, ethically, and explain why the offer is a good one.

The client on the other side needs to vent. Many times clients in litigation with the United States have emotions they need to express before they are ready to settle. Mediation gives them an opportunity to have something like a "day in court" where they can say whatever they need to say.

There will be a continuing relationship between the parties after the case. Mediation tends to be more effective than litigation in leading to a

resolution with which both sides are more satisfied. When a court issues a ruling, often one or both sides are upset with the result. After a mediation where both parties have worked together in fashioning a settlement and voluntarily signed the agreement, relations are often better for the future. This is particularly valuable when the parties must continue to work together after the case, such as in workplace cases.

Confidentiality is valuable for either side. Sometimes either the government or the other side wants to avoid a public trial. In mediation, parties can agree to preserve confidentiality for everything that is said.

What are bad cases for ADR?

You need a precedent. Sometimes you need an appellate court to issue a precedent in a case, perhaps because you have dozens more just like it coming along and you need a court to determine what the law is. Mediation obviously won't help you in this situation.

Court will be quick and cheap. This is rare these days, but sometimes you will have a strong dispositive motion that can avoid the need for a trial. If so, go forward and file the motion.

Settlement of any kind is impossible because it would encourage frivolous litigation. If office policy is not to negotiate certain kinds of cases, mediation is inappropriate. However, you still may want to consider it if you are authorized to offer even nuisance value. Some people seem to think mediation is akin to offering a blank check from the government, but this is not the case. In fact, mediation may offer you a most effective tool for communicating directly to the other client why you cannot offer more than a certain amount.

When in the case should you conduct ADR?

Before or after extensive discovery. The answer to this question depends on the case. Sometimes extensive discovery is necessary in order to properly value the case. Other times, using ADR to settle a case early on can save extensive discovery costs. It is also worthwhile to remember that ADR can help show you what discovery is critical. You may learn from the negotiations what facts are vital to develop in order to settle the case, and then you can conduct limited discovery on those issues.

Before or after motions. Here too, the answer depends on the case. If you have a sure winner, as discussed above, the best approach is probably to file it and dispose of the case. However, if you are not certain how the court will rule, another approach is to file the motion and then conduct ADR while it is pending. The motion may then provide leverage for you to get the other party to agree to your settlement requests rather than face having the case dismissed.

Who should you choose for the mediator?

Federal Magistrate Judges. Some magistrate judges are fine mediators, and they all have the advantage of being free. Further, they have the imprimatur of the court, which can be valuable in certain cases to persuade the other side to settle. However, magistrate judges can also have significant disadvantages. They often have limited time available for settlement work. They often handle discovery and other motions later if the case does not settle, which can make it difficult for you to talk candidly with them during mediation. Similarly, your candor may be limited because of concerns that the magistrate will talk to the district judge about what the parties said in mediation. You also generally cannot choose which magistrate you get, and some of them may be biased against the government. Finally, experience has shown that some magistrates use “arm-twisting” methods to coerce the parties into settlement rather than a more facilitative approach based on exploring the interests of the parties.

Retired state court judges. While these mediators also have the imprimatur of a former

judgeship, we have often found they use strong-arm tactics as well. They may lack knowledge of federal defenses that are helpful to our cases. Further, they may be accustomed to state juries, who sometimes award larger damages than most federal courts.

Court-sponsored volunteer mediators. These mediators are free and can be effective, but you have no control over who is assigned to your case, and sometimes quality is mixed. Some court-sponsored programs also limit the amount of time that the mediator will work with you for free.

Private mediators. We have generally found that this is the best source of mediators for government cases. You can choose whom you want, they have plenty of time to work with you, and, because they work full time on settling cases, they are often the most effective mediators.

What should you consider when hiring a mediator?

Experience. Check whether the mediator has been in practice for a long time and has handled many cases. If your case involves a technical area of the law, you may want to ensure you hire someone with subject-matter expertise. However, we have generally found that someone who is talented at mediation can pick up necessary expertise and will do a better job than someone who knows the subject matter but is not as skilled at mediating.

Education and training. Ask for the mediator’s resume and review these areas before making a decision.

Possible bias. Ensure that the mediator is not biased against the government. Some former plaintiff’s lawyers, for example, may favor plaintiffs when acting as a mediator. Others, however, may be able to put their past experience behind them.

Fee. Generally, we have not been precluded from hiring a mediator because of the fee, but it is worth examining. Most private mediators charge between \$150 and \$350 per hour, and this cost is split equally between the parties. This means that the United States’ share is often not much more

than the cost of hiring a court reporter for a deposition. Some private mediators charge exorbitant fees, but we have not generally found they are worth the money. You can often negotiate with a mediator to bring the cost down or ask if the mediator offers a government rate, particularly if the case has significance or can be presented as public service.

Evaluative or facilitative. Some mediators are evaluative, meaning they take an active role in the negotiation and offer their own evaluations of the case throughout the mediation. They may suggest an appropriate settlement figure and even present arguments to the parties that they should accept it. If you are going to hire an evaluative mediator, it may be important that the mediator have expertise in the subject matter of the litigation. Facilitative mediators, on the other hand, take more of a back seat to the desires of the parties and serve mainly to ensure that discussions stay on track. You may want a mediator with a different approach depending on the type of case involved. If the parties want someone to come in and tell them what the case is worth, hire an evaluative mediator. If the parties would not respond well to that approach and need someone with a softer touch, hire a facilitative mediator.

How do you initiate ADR?

Some people are concerned that offering ADR to the other side is equivalent to confessing that your case is weak. Whether or not this was the case earlier, it is not generally the case now, as ADR becomes more common and, indeed, is mandated in many jurisdictions. However, if you are concerned about this impression, you can refer to the Attorney General's order that we are expected to use ADR in appropriate cases and merely state you are acting pursuant to this directive.

How do you write a mediation statement?

A mediation statement should include the following:

A summary of the facts and law on which the parties agree.

A summary of disputed facts and law.

A description of damages claimed and the United States' position on this claim.

A description of the posture of the case, the status of discovery, and any pending motions.

A description of the status of settlement, including the nature of previous discussions. It is often helpful to the mediator if you describe in this section any personality issues of the parties that are interfering with settlement.

Note that mediators have different policies on the confidentiality of these statements, and you should feel free to request whatever procedure you wish. Sometimes the statements are given only to the mediator and other times they are also exchanged between the parties. You may also agree to have some portions of the statements exchanged but have a section that is for the mediator's eyes only.

What should you discuss with the mediator before the mediation?

Note that ex parte contact with a mediator in advance of the mediation is not only ethical, it is often vital to the success of the mediation. Good mediators will usually talk to both sides beforehand, but you should initiate contact if you have not heard from the mediator. Discuss the substance of the case as well as the personalities of the parties. This is the time to mention your fears that opposing counsel is not passing along your settlement offers or that you have client control problems. Tell the mediator what you think he or she should do in order to be most effective. Feel free to make specific suggestions and requests. Learn about the mediator's background and preferences. This information can be helpful to you as you proceed with the mediation.

Who should attend the mediation?

If you are the defendant, bringing the alleged bad actor can sometimes help settlement. Some plaintiffs want to meet personally with the person who allegedly harmed them, and this can help them agree to settle the case. Sometimes the person can offer an apology that will lead the plaintiff to significantly reduce the damages requested, saving the United States considerable money. Other times

you are better off proceeding without this person, however.

If you are the plaintiff, bringing the victim can sometimes humanize the case and increase the amount of the settlement. There can be power in having the person who was harmed present in the room while negotiations are taking place.

A bad witness is worse than none at all. If either the plaintiff or the alleged bad actor will act unproductively in the mediation, you should leave them at home. A plaintiff who is overemotional or a defendant who gets defensive and counterattacks can hurt far more than help. If you do decide to bring someone, prepare the person carefully.

What should you do about settlement authority?

Some mediators will request that someone with full settlement authority attend the mediation. This can present a problem if the dollar value of the proposed settlement exceeds the delegated authority of the attorney who is litigating the case. Generally, a private mediator will agree to have someone with authority available by telephone. You can require that a private mediator agree to this term as a condition of employment. Several judges, however, have ordered that high-level officials from the Department personally attend mediations. We have opposed these requirements in a number of cases, and you should contact the Office of Dispute Resolution if presented with this situation.

How do you prepare the client?

Review the case. You should have detailed settlement discussions with the client/agency counsel prior to a mediation. Review the facts, the law, and the strengths and weaknesses of the case. Explore your underlying interests. Speculate as to the other side's underlying interests. Brainstorm creative settlement options that might meet both sides' interests. Evaluate your best alternative to a negotiated agreement, as well as the worst thing that could happen if you fail to reach a settlement.

Explain the process. Explain the process of mediation to the client, especially if the client has not participated in mediation before. Note that the mediator is not a judge and has no power to decide

the case. Parties who are inexperienced in mediation often do not understand this. Explain that the process is entirely voluntarily, and either side can withdraw at any time for any reason. Describe how the mediation will proceed, first with a joint session where everyone is in the room at the same time, and then usually with separate sessions, where each side will meet privately with the mediator. Explain that the process is confidential, and that no one may testify outside the mediation about what was said in the proceeding. Finally, it is worth pointing out that you may not act as aggressively as you would in court. Parties sometimes anticipate that their lawyers will be forceful and aggressive in any legal proceeding. You should explain that, in a mediation, it is often best to adopt a more conciliatory tone and it can be counterproductive to come on too strong. The client may be advised that if the case does not settle and proceeds to trial, you will be more aggressive at that point.

What should the client's role be in a mediation?

Clients often participate in the opening statement. If you decide to bring your client, it is often helpful to have the person participate at some point in the opening statement. A victim can express hurt and personalize the case. A defendant can express an apology for what happened (while not admitting legal liability). As discussed above, the client must be well prepared to be sympathetic and avoid counterproductive anger.

After the opening, clients generally stay in the background. As the lawyer, you are usually better trained and prepared to handle the rest of the mediation. You should tell the client that you will be doing most of the talking.

An unusually sophisticated client can participate more actively. If you have a strong client, you may consider a coordinated strategy. For example, one of you can be aggressive while the other is more conciliatory.

How should you handle your opening statement?

Do not poison the well from which you must drink for settlement. This is the single most

common error made in opening statements. Accustomed to fiery opening statements to juries, trial lawyers too often come on aggressively in their opening statements. Calling the other side “ridiculous,” “greedy,” or “ignorant,” all of which we have heard in mediation opening statements, is counterproductive. If you watch the eyes of the other side as they are called these names, you will see that they become much less likely, not more, to settle.

Direct it primarily to the other side. The other party, and not the mediator, is the one who must agree to the settlement. Parties often mistakenly give their opening statements to the mediator, as if the mediator were the judge. Remember, it is the opposing side that has the power to determine whether mediation is successful.

Offer a non-apology apology. Counter to many litigators’ instincts, it is often far more effective to begin with a conciliatory tone. As defendant, for example, you might begin by looking into the plaintiff’s eyes and saying, “Thanks for coming today. I know this is stressful. I can see how hard this has been for you and your family. No one should have to go through what you have.” Note that you have not admitted liability in any legal sense, nor have you even conceded that the United States has done anything wrong. However, you have expressed sympathy for the plaintiff’s condition, which is often the first time anyone in the government has done so in the several years since the claim was filed. This opening can be enormously powerful in making the other side much more amenable to settlement.

Have an iron fist inside the velvet glove. While it is beneficial to be warm and conciliatory, there is a place for firmness in the opening statement as well. For example, a plaintiff should believe that even though you are sympathetic, you will do your job and ensure that the United States does not pay any more than the claim is worth. Somewhere in the opening it is worth saying something like, “You should know that, if necessary, we are fully prepared to litigate this case. While it is not our preference to go to trial, we would offer the following defenses and we expect they would prevail. . . .” This statement is

often best placed in the middle of the opening, surrounded at the beginning and the end by more conciliatory statements.

Bring a few exhibits and visual aids. As in trial, it is often helpful to bring visuals to make your point. If there are a couple of key documents that illustrate your case powerfully, be sure to bring copies for the mediator.

Include the mediator. While the focus of your opening should be to persuade the other side to settle, it is valuable to reach out to the mediator from time to time as well. At points later during the mediation, having the mediator on your side can be invaluable. Whether they realize it or not, most mediators do apply subtle pressures on parties to settle. If the mediator believes you are right, these pressures will work more in your favor. This is especially important if you have hired a mediator who is evaluative.

How do you advocate in joint session?

Persuade rather than defeat. As described above, litigators often have difficulty making this vital transition. Your goal in mediation is to convince the other side that they should settle. This goal is fundamentally different from your goal in trial, which is to vanquish them. Ensure that your approach is productive in meeting this goal.

Act as if you are in a deposition. It is often helpful to see mediation as more like a deposition than an adversarial evidentiary hearing. In a deposition, your goal is to let the other side talk and learn what their version of the facts is, so that you can counter it. In mediation, you want the other side to talk so you can learn what their underlying interests are, and you can suggest a settlement proposal with which they are likely to agree. You often will get your own interests met by meeting theirs.

Watch their body language. Having watched dozens of mediations, I am amazed by how transparent people can be in their body language. At certain points in the mediation, parties will throw their shoulders back, grunt, or roll their eyes. These actions can be extremely telling in

understanding what they are feeling. Mediations can be as much psychological as legal at times.

How do you advocate in private caucus?

Learn from what the mediator says and doesn't say. The moment a mediator enters the room to talk with you privately, after just meeting with the other side privately, listen carefully for the first things the mediator says. These will often be valuable clues as to what was just discussed with the other side. "The dog that didn't bark," or what the mediator fails to say, can often be equally significant.

Leave yourself room to move. Just because you are meeting confidentially with the mediator does not mean you should confess your bottom line in the first session. Mediators are human beings, and they will feel a conscious or subconscious pressure to move you toward whatever you say is your bottom line, especially if this is necessary in order to settle the case. Do not lie about your bottom line, just avoid revealing it too early.

Give the mediator ammunition to use against the other side. Private caucus sessions often include a period when the mediator argues with each party that its case is weak enough that it should accept settlement. Give the mediator arguments to use with the other side in this session. Armed with your information, the mediator will be more persuasive with your opponents. Indeed, some lawyers don't make their best arguments in joint session, but rather they save them and have the mediators use the arguments on their behalf in private caucus. They know that arguments can be much more effective when delivered by a neutral mediator rather than a self-interested party.

Give the mediator settlement proposals to float anonymously to the other side. Research has shown that when a party hears a settlement offer delivered by the other side, the party instinctively devalues it. Experienced practitioners suggest a settlement proposal to the mediator instead, and ask that the mediator deliver it without divulging its source. When the other party does not know the source of the offer (perhaps it came from the mediator, for example), the other party will not immediately devalue it.

If necessary, use the mediator to reality-test your own client. Sometimes you can solicit the mediator's assistance in educating your own client. If you are having difficulty convincing your client of a certain weakness in your case, for example, hearing the argument from the mediator may be more persuasive. You can even mention beforehand to the mediator on the telephone that you would like the mediator to do this for you.

Ask the mediator how to proceed. If you seem to be at a roadblock or do not know what to do next, it can be helpful to ask the mediator for advice. The mediator is oriented in favor of settlement, is experienced in settling cases, and has access to information from both sides. These factors make the mediator uniquely able to offer helpful advice on negotiation.

Be clear on what you want kept confidential. Mediators will honor your confidentiality requests in private caucus, but you should be clear about what is and is not confidential. Some mediators state that they may repeat anything said in the private session to the other side, unless you make it clear you want it kept confidential. Others have the rule that nothing in private session may be passed along to the other side unless you specifically authorize them to do so. In either case, it is worthwhile at the end of each private caucus to clarify with the mediator exactly what you want said to the other side and what you want confidential. This helps to avoid confusion.

Remember that it's your process. The mediator works for you. Do not feel pressure to disclose anything you do not wish to. Feel free to suggest procedures and even to insist on them if they are important to you. Know that you can walk away at any time if you are not pleased with the way things are going. *Be open-minded and creative.* You will often learn information in the mediation that changes your assessment of the case. Be open to adjusting your position your position if the circumstances warrant. Also, the process fosters creativity and you should always be on the lookout for imaginative ways for both parties to achieve their most important underlying interests. This is one of the greatest strengths of mediation.

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Federal Rule of Evidence 410 and the Mezzanatto Decision

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RULE 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty

or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

This article will address proffer agreements, plea negotiations, and when and how it is advisable for a federal prosecutor to require a defendant to waive the protections of Rule 410 of the Federal Rules of Evidence.

I. The basic principles of Rule 410

Whenever you encounter one of the Rules of Evidence, it is helpful to have a series of basic principles that can be applied to the problem at hand. A common evidentiary problem for federal prosecutors arises from entering into plea negotiations with cooperating defendants/suspects. When can a cooperating defendant's statements be

used against him in his own hearing, trial, sentencing or post-conviction proceeding? The place to start is with Rule 410. Broken down into its most basic components, Rule 410 gives rise to the following basic legal propositions:

Basic Rule #1 The prosecution may not introduce into evidence proof of a defendant's guilty plea colloquy, if the defendant changes his mind and is allowed to withdraw the guilty plea, *unless there is an agreement to the contrary.*

This is a bright-line test. A defendant who pleads in court and then withdraws the plea, can not have his own words used against him. It's the same result if the plea is one of "nolo contendere." Remember, the Department of Justice opposes the use of no contest pleas. *See*, USAM at § 9-27.440 and USAM § 9-27.500-530. The rule represents a compromise between the societal interest in discovering the truth through adversarial litigation (yes, the defendant pled guilty) and society's interest in orderly and efficient resolution of criminal cases. As the Advisory Committee notes for the 1974 enactment of Rule 410 state, "Such a rule is clearly justified as a means of encouraging pleading." The discussion below will address when, and if, the defendant can waive the right not to have the plea colloquy used against him.

Basic Rule #2 The prosecution may not introduce into evidence proof of "any statement made in the course of plea discussions with an attorney for the prosecuting authority" *unless there is an agreement to the contrary.*

This part of Rule 410 has given rise to a great deal of litigation, culminating in the case of *United States v. Mezzanatto*, 513 U.S. 196 (1995)(Opinion by Justice Thomas). The text of Rule 410 does not mention any exception to using plea discussion statements; however, the federal courts have found that defendants may "waive" their rights under Rule 410. The *Mezzanatto* case will be discussed below.

Basic Rule #3 The prosecution may introduce into evidence proof of both plea discussions and withdrawn plea colloquies if the defendant (1) is now facing perjury or false statement charges; or (2) has introduced some other part of his plea discussions or withdrawn plea colloquy.

This part of Rule 410 recognizes that courts do not take false statements lightly. The Advisory Committee notes observe that without this provision, "a defendant would be able to contradict his previous statements and thereby lie with impunity." The effect of this provision of Rule 410 is analogous to the rule of completeness contained in Rule 106 of the Federal Rules of Evidence. As a general rule, a litigant who introduces part of a verbatim statement does so at the risk that other relevant parts of the statement will be admissible.

II. Proffers

The most litigated and complex issue arising under Rule 410 is not even addressed in the text of the rule. That issue arises from our Basic Rule #2: When can the prosecutor and the cooperating defendant agree that his plea discussions will be admissible in his own later hearing? Or to put the issue another way, can a cooperating defendant waive his rights under Rule 410? The answer lies in the development of the legal document commonly called the proffer agreement.

In a proffer agreement, a criminal defendant is generally held to make a complete and truthful statement about his knowledge of a particular incident of crime. In return, the prosecuting authority makes promises about restrictions on the use of this information. It is a widely recognized standard of legal practice that defense attorneys will generally not allow their clients to speak to the government without some form of proffer agreement.

In the *Mezzanatto* decision, the Supreme Court described the proffer and plea negotiation process as a "marketplace" where prosecutors and criminal

defendants trade valuable information. *See*, 513 U.S. at 207.

III. The law regarding proffers and Rule 410 waivers

Does every discussion between a defendant/suspect and an agent fall within the protection of Rule 410?

The answer is an obvious no. This part of the rule is only triggered by the existence of plea discussions. Yet, "plea discussions" can arise both before and after the filing of charges. Federal courts have consistently held that Rule 410 *does not apply* to discussions between law enforcement agents and defendants unless there is an "express authority from a government attorney" to enter into negotiations. *See*,

United States v. Lewis, 117 F.3d 980, 983-84 (7th Cir. 1997);

United States v. Sitton, 968 F.2d 947, 956-57 (9th Cir. 1992);

United States v. Porter, 821 F.2d 968, 976-77 (4th Cir. 1987);

United States v. Sebetich, 776 F.2d 412, 421-22 (3d Cir. 1985);

United States v. Davidson, 768 F.2d 1266, 1270 (11th Cir. 1985);

United States v. Keith, 764 F.2d 263, 265 (5th Cir. 1985);

Rachlin v. United States, 723 F.2d 1373, 1376 (8th Cir. 1983);

United States v. Bernal, 719 F.2d 1475, 1478 (9th Cir. 1983);

United States v. Sikora, 635 F.2d 1175, 1175-76 (6th Cir. 1980);

United States v. White, 617 F.2d 1131, 1133-34 (5th Cir. 1980).

Practical suggestion: There is a good argument to be made that the lesson of these cases is that the AUSA should not participate in the taking of the statements from criminal defendants, even at the proffer interview stage.

Defendants who have invoked Rule 410 have often prevailed in having otherwise voluntary statements suppressed. Clearly proffer interviews can be distinguished from witness preparation meetings, which every AUSA should utilize before putting a witness on the stand.

Have the federal courts recognized "proffer agreements" as valid?

Yes. Federal courts have upheld and enforced "proffer agreements." *United States v. Seeright*, 978 F.2d 842, 845-46 (4th Cir. 1992); *United States v. Rowley*, 975 F.2d 1357, 1361-62 (8th Cir. 1992).

What is the impact of the Mezzanatto case?

United States v. Mezzanatto, 513 U.S. 196 (1995), is significant for at least two reasons. First, it resolved a split between the circuits on the issue of waiving the protections of Rule 410. The Ninth Circuit had held that the criminal defendant could not waive his rights under Rule 410, effectively holding that the government could not use proffer-obtained information. The Seventh Circuit had held that Rule 410's prohibition against using "plea discussion" information could be waived. The Supreme Court agreed with the Seventh Circuit's interpretation holding, "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." 513 U.S. at 201.

Second, the *Mezzanatto* opinion also makes it very clear that Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure are "substantively identical." 513 U.S. at 200.

A word of warning, three of the Justices in the *Mezzanatto* panel cautioned that they might reach a different result if the prosecution required the criminal defendant to waive his Rule 410 protections in a proffer agreement and to allow proffer statements into the government's case-in-chief.

What happens if the agent takes a voluntary statement from a criminal defendant, there was no

proffer agreement and the defendant alleges that his participation was a “plea discussion”?

You’ve just won an evidentiary hearing. Where there is no proffer letter, courts still engage in an analysis of the record to see if the statement was part of “plea negotiations.” *See, United States v. Hare*, 49 F.3d 447 (8th Cir. 1995)(Post-Mezzanatto). In *Hare*, there was no “proffer letter.” The trial court admitted the defendant’s statements to agents and an AUSA on the theory that the defendant was an “attorney” and had not entered into plea negotiations on the first day of discussions with the government. *See also, United States v. Acosta-Ballardo*, 8 F.3d 1532 (10th Cir. 1993)(Pre-Mezzanatto). In this case, statements of the defendant were suppressed and the Appeals Court pointed out that the government did not use a proffer letter.

If you’re not convinced about using proffer agreements, consider the aggravation and effort that the prosecutor went through in the recently decided case of *United States v. Young*, 2000WL 1182816 (8th Cir. Iowa). In *Young*, the defendant, with the assistance of his attorney, entered plea negotiations “on the eve of trial.” As part of the plea negotiations, the defendant agreed to sign an affidavit admitting his involvement in drug-trafficking, in return for a recommendation to remain on bond. The plea agreement stated that if the plea agreement was breached, then the government could use any information provided in any prosecution. After signing the affidavit, the defendant hired a new attorney and filed a motion to suppress the affidavit.

At the District Court level, the government argued that the affidavit was admissible at trial because the defendant had waived his Rule 410 rights as part of the plea agreement. (Unfortunately, Rule 410 was not referenced in the plea agreement.) The trial court granted the defendant’s motion because the government could not prove that the defendant had made a knowing waiver of his Rule 410 rights. In other words, the trial court held that the affidavits were part of the “plea discussions” and subject to Rule 410.

On appeal, the government prevailed because a panel of judges agreed that the plea agreement did adequately advise the defendant that he was waiving his Rule 410 rights. Although the story has a happy ending, it contains some cautionary lessons. Whenever possible, draft the proffer agreement as a separate document from the plea agreement. This allows the AUSA to argue that the proffer agreement and proffer statement were preliminary to plea discussions. It also changes the focus from the consequences of a breach of a plea agreement to the more favorable prosecution argument that the defendant affirmatively agreed to the “proffer agreement,” including how his proffer statements would be used. Finally, be sure that the issue of waiving the Rule 410 rights is addressed either in the proffer agreement or during the plea hearing.

Can I use a voluntary statement by a defendant to an agent that was made after a guilty plea, but without a proffer agreement?

Yes. Four Circuits have held that post-plea agreement “statements” are not protected by Rule 410:

United States v. Graham, 91 F.3d 213, 218-19 (D.C. Cir. 1996)(bargaining was post-trial; and there is a policy judgment that post-conviction bargaining has fewer “social benefits” than plea bargaining.);

United States v. Watkins, 85 F.3d 498, 500 (10th Cir.), *cert. denied*, 519 U.S. 908 (1996);

United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir. 1994);

United States v. Knight, 867 F.2d 1285, 1288 (11th Cir. 1989).

What should a proffer agreement state, from the prosecutor’s perspective?

The main reason for seeking a proffer agreement is to obtain useful information from a criminal defendant/suspect. Most prosecutors will draft the language of the proffer agreement, as opposed to allowing defense counsel to draft the language. The benefit of drafting a legal document is control over the language and scope of the

document. The downside is that courts construe legal pleadings in favor of the non-drafting party if an ambiguity arises.

In many United States Attorneys' Offices, the answer is simply to use the standard form proffer agreement. In all other cases, consideration should be given to these issues. First, the proffer agreement should expressly provide that the government can make derivative use of the information provided. In other words, if the defendant/suspect admits he kept the cocaine in a particular hotel under an unknown alias, the government is now free to subpoena the hotel for supporting records.

Second, the proffer agreement should expressly provide that the government is free to impeach the defendant/suspect if he later makes a contradictory statement. This provision is inserted to insure the accuracy of the information provided. See, *Mezzanatto* at 204 ("The admission of plea statements for impeachment purposes enhances the truth-seeking function of trials and will result in more accurate verdicts.").

Third, the proffer agreement must define what testimonial use can be made of the proffer statement. There is a wide range of approaches to this problem. The best approach may be to narrowly define the one thing you won't do, that is agree not to introduce the defendant's proffer statement during the government's case-in-chief. The benefit to the defendant is that this provision preserves his Fifth Amendment right to remain silent. He can negotiate with the government but still elect to go to trial if negotiations fail. There are at least two key benefits to the government in using this approach: obtaining useful information about a crime and preserving the right to quote the defendant at any other hearing (bond hearing, pretrial motion hearing, sentencing hearing, and post-conviction hearings).

Can the prosecutor construct an even more aggressive "proffer agreement"?

With a large caveat, the answer appears to be "yes." The caveat is necessary because federal courts have a history of invoking their "supervisory power" over federal prosecutors

when they perceive any practice to be "over-reaching" of prosecutorial authority. Here are two cases where the prosecution bargained for broader use of plea statements.

In *United States v. Krilich*, 159 F.3d 1020 (7th Cir.), *cert. denied*, 526 U.S. 1011 (1998), the proffer agreement bound the defendant *not to present a defense contrary to his proffer statement*. That case involved a scheme to deliver a kickback payment from a contractor to the son of a public official. The creative defendant/contractor rigged a golf contest so that the prize would go to the public official's son. The defendant/contractor entered plea negotiations and admitted the contest was rigged. However, plea negotiations failed and the matter went to trial. The defendant cross-examined some of the prosecution's witnesses. These same witnesses were sympathetic to the defendant and testified on cross-examination in a manner which cast doubt on the government's case-in-chief. Relying on the following language in the proffer agreement: "[S]hould defendant subsequently testify contrary to the substance of the proffer *or otherwise present a position inconsistent with the proffer*, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury." *Id.* at 1024. (Emphasis added). The trial court allowed the government to introduce the defendant's proffer admissions.

In *United States v. Burch*, 156 F.3d 1315, 1320-22 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1011 (1998), the defendant consented in a plea agreement to the use of his plea statements and subsequent debriefing statements *as part of the government's case-in-chief*, should the guilty plea be withdrawn. The plea was withdrawn, the defendant proceeded to trial, and the government introduced the plea statement and subsequent debriefings as part of its case-in-chief. Such use was permitted.

It is important to note that the waiver of Rule 410 in the *Burch* case was contained in the plea agreement itself and thus did not rest on a "proffer agreement." The Court noted that *Mezzanatto* involved a waiver which was

“negotiated separately” and apart from the plea agreement. Thus, *Burch* does not stand for the proposition that “proffer agreements” may require a defendant to consent to the use of plea discussion statements in the government’s case-in-chief, but neither does it forbid the practice. It does expressly recognize that a criminal defendant who enters into a plea agreement may bargain away his right to keep plea discussions out of the government’s case-in-chief. (Caveat: a practice which at least three Justices on the *Mezzanatto* panel indicated might not be fair). Thus, the *Burch* court appeared to draw a distinction between the value of the benefit of receiving a plea bargain (the greater benefit) and simply entering into a proffer agreement (a lesser benefit).

Practical suggestions: The cautious prosecutor might want to take a two-step approach in asking a defendant to surrender his rights under Rule 410. At the first step, the defendant should be asked to sign a proffer agreement which only allows the government to have rebuttal/impeachment and derivative use of proffer information. At that point in time, no concrete plea concessions have been made by the government and the defendant has preserved his right to proceed to trial and still possesses his Fifth Amendment right to remain silent. The bargaining power between the parties is evenly balanced.

Then, at step two, when both sides have agreed on the appropriate basis for a guilty plea, the plea agreement should include a paragraph which states that the defendant waives his Rule 410 protections with regard to the government’s right to now use his proffer statement even during the prosecution’s case-in-chief, should the guilty plea be withdrawn. It can be argued that the defendant has knowingly given up his right to trial only in return for concrete and specific plea bargain benefits. The waiver of Rule 410’s protections is a reasonable mechanism to insure that the plea is not set aside to gain an unfair tactical advantage, e.g., the unscrupulous defendant who only wanted to obtain one more adjournment of the trial date.

It should be noted that the federal courts in discussing Rule 410 have not always drawn a careful distinction between the under-oath plea colloquy and proffer discussions between an agent

and a criminal defendant. Nevertheless, it is advisable for prosecutors to make the distinction. The first form of testimony involves the sanction and authority of the court itself. The second form of testimony arises from the far more informal setting of two parties attempting to resolve a dispute. It is possible that, at some point, the federal courts may provide a greater protection to under-oath plea colloquy statements than to mere plea discussions between the parties.

In the dissenting opinion to *Mezzanatto*, two of the Justices expressed concern that the government’s bargaining position might become so great that a criminal defendant would be routinely forced into “furnishing evidence against himself” as a prerequisite to even expressing a “desire to negotiate a guilty plea.” This would produce a result which the dissenters described as reducing the right to trial to a “mere fantasy.” 513 U.S. at 218. Avoiding even the appearance of unfair plea bargaining practices might be the best reason not to routinely require a waiver of Rule 410 as to using plea discussion evidence in the government’s case-in-chief.

Obviously, most cases will not require such intricate plea negotiations. In most cases, the use of a proffer agreement with the right to impeach and use derivative evidence is sufficient. However, for the unusual case, requiring the defendant to surrender his Rule 410 protection *as part of a plea agreement* so that the proffer agreement is admissible in the case-in-chief, may insure that the guilty plea is not withdrawn for purposes of delay or unfair surprise by the criminal defendant.

Does the practice of taking proffer statements have any drawbacks?

Yes. In *United States v. Rosario*, 111 F.3d 293, 295-96 (2d Cir. 1997), a criminal defendant was allowed at trial to introduce “exculpatory statements” made by another codefendant during the proffer interviews. The statements were clearly hearsay but were admitted under Rule 806 to impeach the codefendant who had been captured on audiotape. Exculpatory statements about codefendants made during proffers can raise difficult *Brady* disclosure issues.

IV. Conclusion:

The prosecutor's goals are always to seek a just and timely adjudication of the matter under investigation. The proffer agreement is an important tool in determining what type of resolution can be reached in the case. It should always be in writing and should contain language which protects the interests of both parties. For the prosecution, the proffer agreement should normally insure that the government has the right

to impeach the defendant and to pursue derivative evidence leads. Both of these issues insure the accuracy of the cooperating defendant's statements. In the complex or unusual case, the prosecution might consider the use of a waiver of Rule 410's protections such that the defendant's proffer statements, and even the plea colloquy, may be admissible during the government's case-in-chief. The waiver of the Rule 410 leading to the admission of evidence during the government's case-in-chief is best employed as part of the written plea agreement and only after the proffer discussions have been completed. ~

ABOUT THE AUTHOR

Michael MacDonald has been an Assistant United States Attorney for sixteen years and currently handles white collar crime in the Criminal Section of the United States Attorney's Office for the Western District of Michigan. Mr. MacDonald has been an instructor at the Office of Legal Education course "Evidence for Experienced Criminal Litigators" since 1989. [a](#)

Getting Parties to the Settlement Table: An Essential Component of ADR Advocacy

Peter R. Steenland, Jr.
Senior Counsel for ADR
Office of Dispute Resolution

From the ADR reports you have been sending to us, we have learned that mediation is clearly the preferred choice of ADR processes among Assistant United States Attorneys. Moreover, it is equally clear that if the parties are able to agree on the selection of a competent mediator, their dispute is likely to settle as a result of mediation. At the same time, we believe that there still remains a vast number of cases where ADR would work, if only the parties could agree to try it. To take advantage of the benefits of ADR in those

cases, therefore, our advocacy in mediation must begin far in advance of our first meeting with the mediator. Advocacy begins in persuading the other side to agree to mediation. Here are several critical steps in that process.

Educating the other side -- Judicial settlement conferences are an important and valuable component of any judicial system. These conferences also provide a ready source of disheartening stories about cases in which the judicial officer pushed quite hard in "encouraging" parties to reach settlement. Unfortunately, a number of courts identify this potentially coercive practice as "mediation". It is, therefore, no surprise that some opposing counsel are less than

enthusiastic when we invite them to join us in a mediation in a lawsuit involving the United States.

Advocacy requires us to reach out and assure opposing counsel that when we suggest mediation, we are not raising the specter of some masochistic settlement process, but are simply proposing the selection of a neutral expert to facilitate our settlement negotiations. The mediators we hire can't coerce us because we, as counsel, retain control over all decisions respecting settlement. Since we have jointly hired the mediator, he or she, as the employee of both parties, is there to do our bidding only.

An attorney who is an effective mediation advocate is capable of identifying the basis for opposing counsel's reluctance to use mediation, and through education, demonstrating that neither counsel nor parties can be hurt by this process.

Dealing with perceptions -- One reason so many cases settle on the courthouse steps is that many lawyers are afraid of the perceptions that may be created if they initiate settlement discussions earlier in a case. These lawyers believe that suggesting settlement is a sure sign opposing counsel will conclude that your case is fatally weak on the merits, or that you suffer from a lack of preparation or resolve.

These lawyers may need explicit assurance that we will draw no such inferences from their willingness to consider our mediation proposals. Since we are now using ADR on more than 2,000 matters every year, we surely would not want anyone to draw such conclusions about our willingness to mediate. In fact, we have learned that a skilled mediator can help us get quickly to the heart of a case and avoid lengthy (and often pointless) pretrial litigation. We can also point to the ADR Act of 1998, in which Congress directed all district courts to establish effective ADR programs that require every civil litigant to consider the use of ADR at some point in the case. Thus, this part of our advocacy should stress that the likelihood of causing misunderstandings attributable to early settlement proposals or suggestions to mediate are remote and anachronistic. Indeed, we can make a strong case for attributing weakness or indifference to opposing counsel's refusal to consider using ADR.

Since most cases are going to settle in any event, we should use a process that will maximize our ability to negotiate intelligently and not leave anything remaining on the settlement table. We should challenge opposing counsel to recognize the explosive growth of mediation and the realization that it has become an essential technique for all litigators to master.

Concern over "free" discovery -- On some occasions, we have heard opposing counsel resist our suggestions to use ADR on the ground that they "don't want to give the government free discovery." Again, we need to don our advocacy hats to remind opposing counsel that the very purpose of the litigation process is to obtain discovery about the other side's case in anticipation of a presentation to judge or jury. Since each side is likely to learn certain information about the other side's case before trial, why not allow that information to come out in an informal setting where the timing of information disclosure can be adjusted by counsel to advance their purposes? In mediation, the parties retain greater control over the information disclosure process than they do in the more formal context of discovery. For this reason, the use of a mediator to both reveal and gain information is a sign of skilled trial counsel.

Dealing with costs -- The cost of ADR can be a legitimate concern to private counsel, especially in cases where their likelihood of prevailing against the government is far from certain. Of course this is not a problem for our attorneys, because we do not bill our clients and also because the Office of Dispute Resolution underwrites our share of the professional services of all ADR providers used by Department litigators.

As a mediation advocate, you can advise opposing counsel that, in many circumstances, mediators are less expensive than court reporters. Thus, while we know most cases will require some core discovery, counsel may be able to save their clients money by employing ADR at an early stage of the litigation. These parties often rely upon the mediator to arrange for additional discovery to be conducted, if initial settlement talks reveal the need for it. Indeed, a growing number of attorneys are now retaining mediators for case management

purposes, to make core discovery more efficient and less contentious.

Trial preparation is traditionally very expensive and time-consuming. Mediation offers an attractive and responsible alternative: informed settlement negotiations, grounded in a foundation of core discovery and the good faith pledge of both sides to augment that discovery, if necessary, during settlement talks. It's a prudent and more efficient way for private counsel to spend the client's litigation budget. It also works for us.

Dealing with egos - - It is simply astonishing how many highly experienced litigators (and senior managers) peremptorily dismiss any use of ADR on the belief that "if I can't settle this case on my own, then no one can. This case just won't settle." Such an attitude, whether expressly stated or tacitly transmitted, may be your greatest challenge as a mediation advocate in getting the other side to the table.

When we teach mediation advocacy and enhanced negotiation skills at the National Advocacy Center, we encourage our attorneys to transcend the positional arguments presented by our opponents at the negotiation table. Instead, we encourage our litigators to look and listen for parties' interests, so that we may fashion settlement proposals that address these underlying concerns. However, this concept is easier to describe than it is to apply. That is because in any negotiation, information equals power. Therefore, we carefully ration information sharing during unassisted settlement negotiations, so as not to disadvantage our cause.

A failure to candidly discuss the parties' interests can lead to deadlock or to constructing a needlessly expensive settlement. For example, if we learn from our opponents that they actually want a settlement containing elements of non-monetary compensation, such as an apology or change in agency conduct, our willingness to provide that non-monetary compensation may dramatically reduce the amount of money also included. However, if all parties believe that only money is available to settle a dispute, they are almost certain to overlook other arrangements that are actually more attractive to both sides. Fear of sharing information means that parties miss

opportunities to negotiate more intelligently. A mediator, on the other hand, controls the pace and extent of any information disclosure. The mediator can supervise the exchange of information in ways that do not disadvantage either side, thereby allowing for more candor and more informed talks.

You can also show opposing counsel how private caucuses with the mediator will give each of you the freedom and the safety to discuss matters neither of you would ever dare to raise in a one-on-one negotiation with the other. Generating settlement options and identifying differing interests are some of the key contributions a skilled mediator can make to a negotiation exchange. The identification of interests in some cases can be critical to client satisfaction. If winning in court may not actually solve their problem with the government, then their counsel should be looking for a settlement that will accomplish that goal. Similarly, there are occasions when a victory for the United States does not solve the problem that caused the lawsuit to be filed. In either of these contexts, ADR is appropriate because it allows the parties to construct solutions to disputes that courts don't have the authority to impose.

This concept is best illustrated by the mediation of a case involving the False Claims Act. When the United States brought suit against a contractor and alleged that the government had been defrauded by egregiously shoddy construction of facilities needed by a government agency, it stood to obtain several million dollars in civil penalties if we prevailed. At the same time, the government agency still faced a huge problem finding the funds to repair the shoddy construction. Winning the suit would have put all the civil penalty money into the Treasury. Those funds would not be available for repairs. After consultation with the client agency, the litigators convinced opposing counsel to use mediation. After several sessions, the case settled. The defendant agreed to pay a modest civil penalty and also agreed to underwrite the cost of rehabilitating its earlier construction activities. No court would have had the authority to order such action, nor was it likely that this outcome would have resulted from one-on-one negotiations. Yet, because the mediator was able to get the attorneys to shift their focus from judicial outcomes to client needs, the

parties were able to reach a settlement that satisfied both sides.

Accordingly, when opposing counsel asserts that there is simply no way to reach a settlement in a particular dispute, you can remind them that mediators deal with such concerns daily. Really good mediators prove their worth in such cases, by identifying interests, generating options otherwise unexplored and testing each party's assumptions about the other. The one thing the mediator cannot do is to force the parties to reach an agreement. Because the attorney maintains control of the process, an ever-growing number of litigators have concluded that mediation is one of the essential tools available to them to advance their clients' interests. When this process works, no one leaves anything of value on the settlement table.

Other occasional strategies – Here are a few other thoughts that may be of assistance to you in persuading your litigation opponent to consider mediation as an alternative to litigation. First, if you are able to make a case for saving litigation fees through the use of mediation, it makes sense to insure that this suggestion has been carefully considered by our opposing parties as well as by their counsel. In our experience, parties are more willing than their counsel to try mediation. Second, in cases where truly sophisticated mediators are available, it may be helpful to have the mediators make the initial contact with our opponents in an effort to persuade them to try the process. By initiating that contact, the mediator may be able to demonstrate how mediation works, and how information can be exchanged efficiently with

opposing parties. In this effort to convene the mediation, the mediator may also be able to discuss aspects of the case with our opponents they would not share with us, and thereby open their eyes to the process. Finally, if your case has many issues and seems unduly complicated, it may be possible to convince the other side to use a mediator simply to settle some of the more peripheral issues and sharpen the case for trial. It's amazing how many cases settle once the parties get down to work with a good mediator. Our office is always available to discuss these and other strategies to assist you in getting our litigation opponents to the settlement table. We have used a variety of techniques to educate, persuade and motivate our opponents to use mediation. As a rule, if these efforts are successful and the mediator is skilled, negotiations will result in a swift settlement acceptable to all. Let us know how we may be of assistance to you. ~

ABOUT THE AUTHOR

Peter R. Steenland, Jr. joined the Department of Justice in 1970 as a staff attorney in the Appellate Section of the Environment and Natural Resource Division. From 1978 until 1995, he served as the Chief of the Appellate Section in that Division. Since 1995, he has been the Senior Counsel for ADR in the Office of Dispute Resolution. Mr. Steenland has received the John Marshall Award for Appellate Advocacy in 1986, the Attorney General's Award for Distinguished Service in 1995, and the Presidential Award for Distinguished Service in 2000. His articles on dispute resolution have appeared in the "University of Toledo Law Review", "Consensus Magazine", "Alternatives Newsletter", and the "Dispute Resolution Magazine" of the American Bar Association. **a**

Evaluation of ADR in United States Attorney Cases

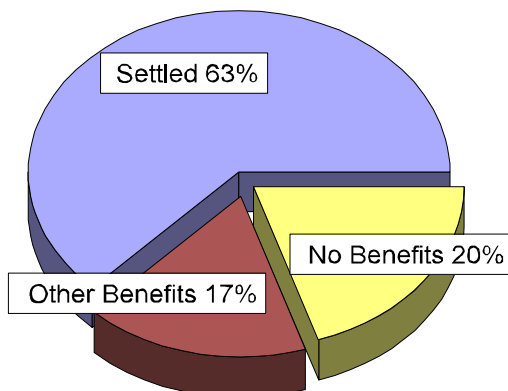
Jeffrey M. Senger

Deputy Senior Counsel for Dispute Resolution

To measure the effectiveness of alternative dispute resolution (ADR), we conducted a study of 828 civil cases in which Assistant United States Attorneys used ADR over the past five years. This research is based upon evaluation forms completed by AUSAs upon the completion of a case. The evaluation forms measure information on many aspects of the ADR process, including timing, fees paid to the neutral, whether the ADR was mandatory or voluntary, estimated time and money savings, and success of the process.

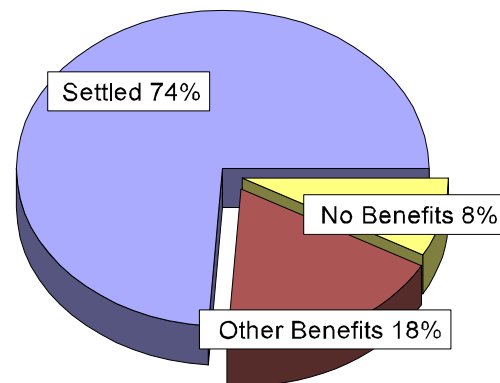
Overall, ADR was successful in settling almost two-thirds of the cases where it was used. AUSAs reported that the process had other benefits, even where the case did not settle, in another 17 percent of the cases. These benefits included gaining insight into the plaintiff's case, preventing future disputes, and narrowing of the

Effectiveness of ADR



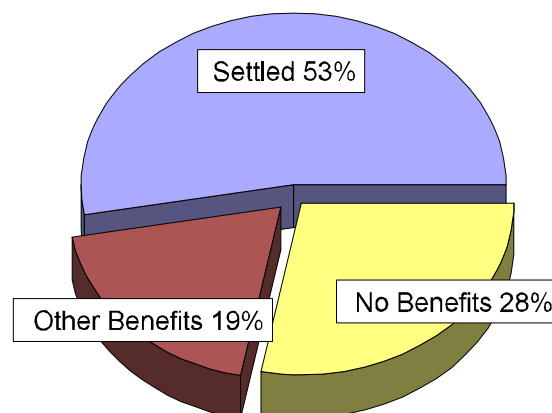
issues in the case. Thus, ADR added value in four-fifths of the cases where it was used. This information is shown in the chart below.

ADR in Medical Malpractice Cases



There were significant differences in ADR effectiveness depending on the type of case in which it was used. ADR was most effective in

ADR in Title VII Cases



medical malpractice cases, settling almost three out of every four cases where it was used. This information is shown in the chart above.

In contrast, ADR was least effective in settling Title VII employment discrimination cases. Nonetheless, ADR was successful in settling slightly more than half of these cases, as shown in the following chart.

It is unclear why Title VII cases settled less frequently, particularly given the reported success of ADR in these cases in other contexts. For example, in administrative Title VII cases at the Postal Service and Air Force, ADR successfully settles between 70 and 80 percent of cases in which it is used. There are many possible explanations. One difference may be that by the time an employment discrimination case reaches the Department of Justice, the parties have already had an opportunity to settle at the administrative level and refused to do so. Negotiations may have been going on unsuccessfully for a year or more. While medical malpractice and other tort cases also can have lengthy administrative processes, the personal feelings in these cases may not be as strong as in Title VII, and thus the delay is not as harmful to settlement.

In general personal injury tort cases, ADR was successful almost as often as in medical malpractice, and it was valuable in almost nine-tenths of the cases where it was used. Specifically, 71 percent of these cases settled in ADR, benefits to ADR were reported in another 17 percent of the cases, and there was no benefit in 12 percent of the cases.

AUSAs were asked to report the costs of ADR, which are set forth in the following table.

COSTS OF ADR	
Average fees paid to the mediators ¹	\$867*
Average time spent in preparation	12 hours
Average time spent in mediation	seven hours

*Note that fees for mediators now come out of a central Department of Justice budget, rather than individual budgets.

The above figures varied somewhat depending upon the type of case in which ADR was used. The average Title VII mediation was the most expensive at \$1007, and the average motor vehicle tort mediation was the least expensive at \$375. This difference may reflect the relative complexity of these types of cases. AUSAs reported that medical malpractice mediations required the most preparation time, an average of 17 hours per case, while motor vehicle torts required only five hours of preparation.

AUSAs reported benefits from ADR that far exceed these costs. Reporting forms asked AUSAs to estimate savings in time and money in each case where ADR was used, and these savings are summarized below.

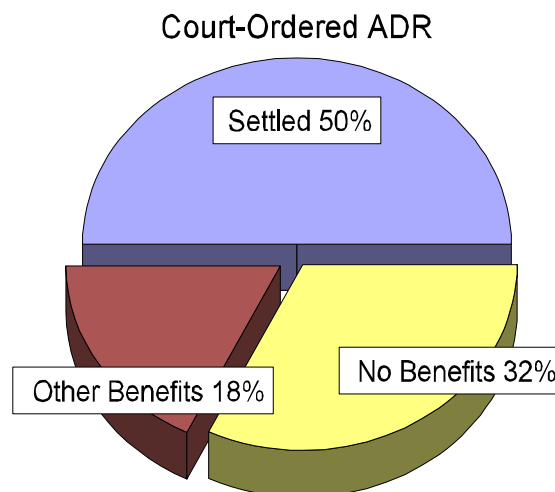
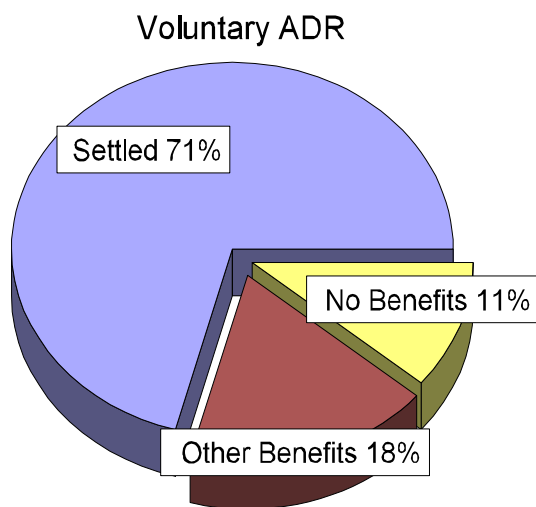
BENEFITS FROM ADR	
Average Litigation Costs Saved	\$10,700
Average Staff Time Saved	89 hours
Average Litigation Time Saved	6 months

On the reporting forms, "Staff time saved" is defined as "the number of hours you and others (including paralegals) would have spent on this case if ADR had not been used." "Litigation time saved" is "the number of months it would have taken to achieve final resolution of the case if ADR had not been used." "Litigation costs saved" means "the amount of money you would have spent on transcripts, witness fees, A.L.S., travel, etc. to prepare and litigate this case if ADR had not been used." (These computations were obtained from prior forms, revised in 1997 to accommodate concerns of civil chiefs.) Thus, even though many of these cases would have settled anyway, the AUSAs believed it would have taken longer and cost more to settle them without the use of ADR.

These figures also varied somewhat depending on the type of case. The greatest savings of time and money were realized in Title VII cases, where average staff time saved was 104 hours and

average litigation costs saved were \$17,683. Thus, while the ADR settlement rate in these cases was relatively low, the savings realized were relatively high. Medical malpractice cases also reported high savings rates. The average staff time saved in these matters was 111 hours and the average litigation costs saved were \$13,317. As noted above, these cases can be among the most complex on the docket, requiring considerable time and resources to litigate if they do not settle. The lowest savings rates were reported in motor vehicle tort cases, where the average staff time saved was 56 hours and average litigation costs saved were \$8,433. These cases are generally relatively straightforward to litigate if settlement does not occur.

We compared success rates of ADR in cases where ADR was mandated by the court with cases where its use was voluntary. As shown in the charts below, ADR was more effective when it was used voluntarily.



This finding is interesting, and it differs from other research on the topic which has found that mandating ADR does not decrease its effectiveness. *See* Stephen B. Goldberg and Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 NEGOTIATION J. (1990); Craig A. McEwen and Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *MEDIATION RESEARCH* (Kenneth Kressel, Dean G. Pruitt and Associates, 1989); and Jessica Pearson and Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH* (Kenneth Kressel, Dean G. Pruitt and Associates, 1989). There are a number of factors that could explain this disparity other than voluntariness. For example, perhaps the mediators AUSAs use in voluntary cases are more skilled than those in court-ordered programs. It is also possible that the cases where AUSAs voluntarily choose to use mediation are more amenable to settlement than those where mediation is ordered by the court. Nonetheless, the difference is stark. Also, a number of AUSAs noted on the reporting forms that they were displeased when the court ordered them to use mediation in a case where they did not believe it would be effective.

Differences also exist in the effectiveness of ADR depending on the time in the case when it is used. ADR was significantly more likely to lead to settlement when it occurs closer to the time of trial, as shown below.

ADR SETTLEMENT RATE BY TIME OF USE	
Fewer than 90 days before trial	72 percent of cases settled
90 or more days before trial	53 percent of cases settled

On the other hand, however, savings were much greater the earlier ADR was used in the case, as shown below.

ADR SAVINGS BY TIME OF USE		
	Fewer than 90 days before trial	90 or more days before trial
Litigation costs saved	\$5125	\$10,000
Litigation time saved	three months	six months
Staff time saved	73 hours	89 hours

Thus ADR is more likely to result in settlement if it is used later, but ADR leads to greater savings if it is used earlier. The relative importance of these various factors will depend upon the nature of each individual case.

There is some evidence that ADR is particularly effective in larger-dollar cases. To study this, we examined the universe of cases where ADR was used and the case was eventually settled. In these cases, either ADR was successful in settling the matter or ADR was unsuccessful, but settlement occurred later. Of these cases, different results were found depending on the size of the eventual settlement. Where the settlement was for less than \$30,000, ADR was successful 78 percent of the time. Where the case settled for between \$30,000 and \$120,000, ADR was

successful 85 percent of the time. Where the case settled for more than \$120,000, ADR was successful 90 percent of the time.

Finally, AUSAs who completed the survey described the advantages ADR can provide. Here are some quotes from AUSAs on the value of ADR in cases where settlement occurred:

- “Mediation helped patch up an employee/employer relationship, preventing other foreseeable disputes.”
- “The settlement was better and more carefully designed than what a court would have ordered.”
- “This case would not have been resolved without ADR. When we started, the parties could not even stand to be in the same room together.”
- “It was great to bring the plaintiff and the agency counsel together to discuss what allegedly happened. It also encouraged the agency to realize the actual risks of trial.”

AUSAs also reported a number of benefits from ADR even when the case did not settle. Here is a sample of these statements:

- “Mediation gave us free discovery and insight into plaintiff’s position.”
- “Mediation gave the plaintiff a reality check and moved negotiations much closer.”
- “Mediation showed the court the good faith conduct of the government in dealing with the pro se plaintiff.”
- “ADR allowed us to express our sadness at plaintiff’s loss while maintaining our view that VA care was adequate.”

We are currently conducting further study using LIONS data that should provide additional information on the effectiveness of ADR, and we will publish this research as soon as it becomes available.

ABOUT THE AUTHOR

Jeffrey M. Senger has been with the Department of Justice for twelve years and currently serves as the Deputy Senior Counsel for Dispute Resolution. Mr. Senger began his Justice Department career as a Senior Trial Attorney in the Civil Rights Division and then served as an Assistant Director at the Office of Legal Education. He has published an article in "Journal of Dispute Resolution", Volume 2000.^a

Website Is an Alternative Dispute Resolution Resource

Jeffrey M. Senger

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The Office of Dispute Resolution maintains an ADR website with a number of resources for AUSAs who are considering using these techniques in litigation. The address of the site is www.usdoj.gov/odr.

The site includes a downloadable model agreement for all parties and the mediator to sign prior to commencing a mediation. The agreement contains language on topics including confidentiality and government policies on the obligation of funds to pay the mediator. AUSAs can tailor this document for the particular needs of their case. There is also a copy of the form for authorization to hire a neutral (form OBD-47) along with instructions for completing the form.

Other resources on the site include a number of documents describing Department policies on the use of ADR. The first is the Attorney General's order that attorneys are "expected to use ADR in appropriate cases" and describing the Department's ADR program. Pursuant to this order, each civil litigating component, including the Executive Office of United States Attorneys, published a document describing its ADR policy. These policies include a description of case types in which ADR is most and least appropriate, general factors to consider when deciding whether

to use ADR, how to choose what type of ADR to use, advice on what stage of the case is best for ADR, and guidance on selecting a neutral. The site also includes a description of Department policy on the propriety of binding arbitration and an evaluation of ADR programs in the Department. Twelve speeches by the Attorney General on ADR are available as well.

A number of Presidential and Congressional documents pertaining to ADR are also collected at the site. The President's Executive Order on Civil Service Reform, which includes an ADR component, as well as the President's Memorandum on Interagency ADR are available. The Administrative Dispute Resolution Act of 1996 (which covers agency ADR) and the Alternative Dispute Resolution Act of 1998 (which requires every federal district court to implement an ADR program) are reproduced on the site. Two publications from the Federal Judicial Center are available, which describe the ADR programs in every individual federal district and circuit court in the country.

Finally, the site contains a link to the website of the Interagency ADR Working Group, which is also maintained by the Office of Dispute Resolution. This Working Group, which is chaired by the Attorney General, offers ADR programs and training throughout the executive branch. This website includes the Federal ADR Program

Manager's Resource Manual, a 220-page document covering all aspects of ADR, including how to design an ADR program, how to conduct ADR training, obtaining services of a neutral, ethics, confidentiality, and evaluation. Electronic email forums are available that allow you to send a question to several hundred federal ADR experts at the same time and solicit responses. Previous discussions on this listserv have included recommendations for good mediators, ideas about training courses, and general lessons learned/best practices in ADR. Finally, this site includes a

large assortment of materials created by various components in the Working Group, which includes sections on workplace, claims against the government, contracts, and civil enforcement cases. There are manuals, PowerPoint presentations, and evaluations covering ADR programs throughout the Federal Government. ~

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Jeffrey M. Senger has been with the Department of Justice for twelve years and currently serves as the Deputy Senior Counsel for Dispute Resolution. Mr. Senger began his Justice Department career as a Senior Trial Attorney in the Civil Rights Division and then served as an Assistant Director at the Office of Legal Education. He has published an article in "Journal of Dispute Resolution", Volume 2000.a

Settling Medical Malpractice Cases Through Mediation

*Peter R. Steenland, Jr.
Senior Counsel for ADR
Office of Dispute Resolution*

Settling complicated medical malpractice cases can be exhausting, time-consuming, and expensive. Plaintiffs and their counsel, often mesmerized by sky-high jury awards in state courts, may not appreciate the subtle but substantial distinctions involved in proceeding in federal court under the Federal Tort Claims Act. Emotion plays a large part in many cases, with plaintiffs and their families finding that the litigation has reawakened feelings of hurt, anger, and loss. Often, substantial discovery and retention of high-priced experts are necessary preconditions to any settlement negotiations. These and other factors only work toward making complicated medical malpractice cases even harder to settle.

As shown in another article in this publication, the success rate of Assistant United States

Attorneys in settling medical malpractice cases when a mediator is used is around 74%. Even when we don't settle, mediation produces some benefit in another 18% of all medical malpractice cases. Medical malpractice cases are uniquely well-suited for dispute resolution processes in general, and mediation, in particular, even though they are hard to settle in unassisted negotiation.

Eric R. Galton is a full-time ADR provider in Austin, Texas, who has successfully mediated more than 900 medical malpractice cases. He recently joined me in a presentation at the National Advocacy Institute during an Advanced Medical Malpractice Seminar. This article presents some of the points we shared with the class that day, along with additional thoughts that Mr. Galton and I have given to this subject.

All medical malpractice cases begin with a bad outcome for a patient. Because it is basic human nature to seek fault or assign blame after a harmful event, people who perceive that they have been

injured are looking for the cause of their suffering. How that question is answered often decides if a lawsuit will be filed, and whether it can be settled efficiently.

According to Mr. Galton, there is compelling evidence that the majority of medical malpractice cases arise from some form of dysfunctional communication between a health care provider and the patient, and that mediation provides the type of communication necessary to repair that breach. Perhaps the health care provider never gave the patient any explanation for the bad outcome. Alternatively, the health care provider may have given a confusing or delayed explanation for a bad outcome, or was perceived as callous in delivering the explanation. Perhaps, driven by fear of liability, the health care provider failed to demonstrate any compassion or express any regret to the patient. Equally possible, there may have been a fully adequate explanation that neither the patient nor the family understood, or they may have misinterpreted the explanation provided.

As a result of communication failures, defendants in these cases often include highly trained professionals who perceive the medical malpractice lawsuit as a challenge to their professionalism and competency. They simply do not understand why lawyers have inserted themselves into the doctor/patient relationship, and their defensive reactions (as well as the dictates of their lawyers) shut down all communication not supervised by the attorneys. On the plaintiff's side, the language of these cases, used by the lawyers and the doctors, is foreign to the untrained plaintiffs because complex causation issues and legal questions of liability often require a degree of expertise far beyond the skill of even the average attorney.

What is more, the difficulty of settling these kinds of cases is exacerbated by the stark dissonance between the goals of modern medicine and the operation of the civil justice system. Mr. Galton, a former civil trial litigator, points out the following:

- Modern medicine is designed to heal, while the focus of litigation is to assess blame and attribute fault.

- Litigation requires control of all communication between the parties, as everything is screened for admissions and is filtered through the prisms of relevancy and admissibility.
- Litigation, with its inevitable delays, cannot accelerate "closure" and only aggravates the pain felt by both plaintiffs and individual defendants.
- Litigation has nothing to do with underlying interests, and the parties' true concerns may be overwhelmed by a system designed to find blame.
- Litigation can destroy existing valuable relationships, including those between health care providers and their patients.
- Plaintiffs may value highly sincere apologies, and individual defendants may need forgiveness, but neither can be provided through the civil justice system.

Because the civil justice system is designed to operate in a way that is antithetical to the goals of medical science, doctors do not communicate well with lawyers, and lawyers do not always understand the most compelling needs of their clients in medical malpractice disputes. That is exactly why mediation seems to work so well in these cases. The goals of mediation are almost entirely consistent with the goals of modern medicine. Consider the list assembled by Mr. Galton:

- Mediation places high value on communication, and on gaining an understanding of why something happened, or how it occurred. Doctors are similarly dependent on such candid communication to achieve accurate diagnoses of patients.
- Mediation and medicine value the benefits of healthy relationships, and seek to restore those that have been frayed.
- Mediation does not focus on assessing blame, but seeks to help parties find solutions that are mutually acceptable.

- Mediation addresses emotions, and allows the parties opportunities for conciliation, apology, and forgiveness, if that is what they need.
- Mediation is not controlled by rigid rules, but is inherently flexible and adaptable to the unique demands of each situation.
- Mediation, if used early, can assist in providing closure at a time when the parties need it the most.
- Mediation may help the parties to shape solutions which the civil justice system may not and cannot provide, but which are equally if not more important than the remedies available in court.

For all these reasons, a truly skilled medical malpractice litigator, as counsel for either plaintiff or defendant, is certain to consider carefully the use of mediation in such cases. Unlike litigation where the lawyers command and control over the case is virtually complete, counsel in a mediation session will work to prepare the clients for playing a significant role during the mediation. Indeed, the attorneys who seem to do the best in mediation settlements are those who work with the parties to the dispute and arrange for maximum participation by them in the process.

It is not uncommon to see plaintiffs express disappointment or anger in the context of a medical malpractice mediation session. Very often, plaintiff's ability to "vent" directly at a physician is a necessary precondition to effective settlement discussions. The release of these emotions is not nearly as effective if directed at the mediator, or at defendant's attorney. The essence of this dispute is a conflict between patient and doctor, and that is where such venting is most effective. Emotion aside, the plaintiff also can be obsessed with a need to explain to the physician how the alleged negligence has adversely affected his or her life, and to obtain some signal that the defendant now understands the depth and extent of their suffering.

Moreover, defense counsel have seen mediators introduce non-economic components into medical malpractice settlement discussions, and that such non-economic elements can be highly valued by plaintiffs. By creating non-economic

value, this process allows the parties and their counsel to go far beyond the remedies available in court and to construct resolutions based on factors that respond to needs other than money.

Many plaintiffs are reluctant to settle their malpractice claims because they are still waiting for someone to make sense out of the tragedy in which they were involved. Absent such understanding, it is difficult for plaintiffs to reach closure, and without closure, settlement is highly problematic. Mediation, because of its confidential nature, allows the prudent defense counsel to make the physician available so that the plaintiff can get an explanation of exactly what happened. The ability to learn why things developed as they did will expedite settlement by making it easier for plaintiffs to reach closure. Absent the protection afforded by mediation, litigation concerns would require the attorneys to control every conversation, and such a discussion would be almost impossible to have.

As Mr. Galton notes, the need for this conversation is not limited to the plaintiff, especially in cases where there is a likelihood that the defendant may have been negligent. In that context, the doctor's ability to have such a discussion with the plaintiff is therapeutic for both parties, and can provide the catalyst for closure. In cases where negligence is not likely, the physician may wish to share with the plaintiff the steps he or she took independently to ascertain whether a mistake had been made, thereby demonstrating the doctor's care and concern. Alternatively, the physician may wish to offer a more complete explanation of what occurred, and to engage the plaintiff in a dialogue over the events and actions in question.

Mediation also creates an environment where the mediator can work with the parties to assess whether and how to convey either an expression of regret or an apology as an appropriate and effective element of a potential settlement. In circumstances where the physician and defense counsel believe no negligence has occurred, an expression of regret can be most helpful in advancing the talks. Such an expression is not an apology, but an empathetic statement acknowledging the pain, hurt and suffering

associated with an unfortunate outcome. In some cases, this is a large component of what the plaintiff requires for settlement. Even so, such a statement of regret must be sincere, and is far more effective if delivered by the physician rather than by counsel.

In cases where a plaintiff's verdict is somewhat likely, defense counsel would be foolish not to consider using mediation to structure an apology to the plaintiff. Again, because of confidentiality protections, the likelihood of admitting that apology into evidence if the case does not settle in the mediation is virtually nil. Moreover, an apology provides an appropriate context for a plaintiff to exercise forgiveness or conciliation. An apology empowers those plaintiffs who, for religious, intellectual, or philosophical reasons, are looking for an opportunity to convey forgiveness.

Contrary to perceptions of some trial lawyers, these concerns are not "a bunch of touchy-feely stuff" inappropriate for serious consideration by litigators. As litigators, we all understand that once a medical malpractice suit is filed, the plaintiff has started a process which will result in either the dismissal of the lawsuit, an award of an economic settlement, or most likely, a settlement of the claim. Given the frequency of settlement in these types of cases, we do ourselves and our clients a grave disservice if we fail to consider mediation to achieve settlement. Defense counsel should welcome settlement alternatives that include non-economic components. By failing to use mediation, defense counsel will miss priceless opportunities to craft settlements that address all of the non-economic needs and interests identified above. Ultimately, we wind up paying money for omitting such measures in our settlements.

Consider two recent settlements obtained by using mediation in medical malpractice actions. In the first, a decedent's family sued a hospital, alleging negligence by staff in failing to admit the decedent to the hospital in a timely manner. The difficulty, it seemed, was that the decedent weighed over 400 pounds, and the hospital lacked adequate equipment to weigh the patient. As the patient continued to suffer severe coronary distress, the staff tried various means to obtain the decedent's

weight, and finally settled on pushing his gurney onto a scale in the basement that was used to weigh hospital laundry. By the time the decedent's weight was determined, he had expired. When the hospital decided not to contest liability, it invited the plaintiffs to participate in a mediation session. After one day with a mediator, a settlement was reached which called for a modest sum of money to be paid by the hospital's insurance carrier to the family. The settlement also required the hospital to construct a small facility adjacent to the emergency room where extra-heavy patients could be admitted without embarrassment or humiliation. The hospital also agreed to a sensitivity training program for its intake staff, and to name the new room after the decedent. All parties left the settlement table pleasantly surprised at their ability to negotiate an outcome far better than anyone could have obtained in court.

In this case, the plaintiffs received more than economic compensation, because their needs extended far beyond a demand for money. The plaintiffs needed an outcome that gave some meaning and dignity to the unfortunate demise of their family member. By working together with a mediator and the defendant, they created a facility that virtually eliminates the likelihood that any other patient might suffer a similar fate. No court could provide that kind of relief to the plaintiffs, yet during the settlement negotiations, that aspect of the case assumed more significance than the quantity of money the family received.

In another case, the defendant hospital and staff elected not to contest liability after a middle-aged male patient died during elective surgery in its operating room. The family was understandably angry at the defendants for depriving them of their husband, father, and breadwinner. The demand for money damages was considerable. After reviewing the case, counsel for the defendants persuaded the plaintiffs to use mediation. After two days of negotiation, the case settled for considerably less than defense counsel had predicted as reasonable exposure. While plaintiffs did receive a substantial monetary payment, they also attended a unique event at the hospital. Shortly after settlement, in a ceremony attended by the hospital administrator, the chief of surgery, and the doctor involved, along with family members and friends, a tree was

planted on the hospital grounds, along with a bronze plaque containing the decedent's name. Moreover, the tree was located between the doctor's parking lot and the hospital entrance, so it could be seen every day by the medical staff as they reported to work.

Again, the non-economic component of this settlement was extremely important to the plaintiffs. The counsel for the defendant was able to learn about these non-economic needs and interests from the mediator, and, once informed, she could then engage her client in a more efficient negotiation. Absent the mediation, it is highly unlikely that these interests of the plaintiffs would have emerged, or that the defendants would have been able to respond to them in a manner that helped the plaintiffs reach closure.

As litigators, we need to have the flexibility to use all the tools available to us to represent our clients effectively and efficiently. Medical malpractice cases are especially challenging because the hyper-technical issues of causation and damages are exacerbated by the intense raw emotion of plaintiffs who feel victimized and the sensitivities of doctors who feel unjustly accused. Since most of these cases settle anyway, it is vital that attorneys in this area insure that they have taken all possible steps to maximize the ability to adequately represent their clients. Mediation offers that promise; we should use it to the maximum extent possible in our cases. ~

ABOUT THE AUTHOR

Peter R. Steenland, Jr. joined the Department of Justice in 1970 as a staff attorney in the Appellate Section of the Environment and Natural Resource Division. From 1978 until 1995, he served as the Chief of the Appellate Section in that Division. Since 1995, he has been the Senior Counsel for ADR in the Office of Dispute Resolution. Mr. Steenland has received the John Marshall Award for Appellate Advocacy in 1986, the Attorney General's Award for Distinguished Service in 1995, and the Presidential Award for Distinguished Service in 2000. His articles on dispute resolution have appeared in the "University of Toledo Law Review", "Consensus Magazine", "Alternatives Newsletter", and the "Dispute Resolution Magazine" of the American Bar Association. **a**

ADR in the Environment and Natural Resources Division

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The United States Department of Justice recognizes that the "test of the effectiveness of an

enforcement agency is not how many legal actions are initiated and won, but whether there is compliance with the law." See February 10, 1966 Message of the President to the Congress of the United States, President Lyndon B. Johnson. 31 Fed. Reg. 6187, 80 Stat. 1607 (April 22, 1966). The Department's Environment and Natural

Resources Division has sought to enhance the effectiveness of its programs by incorporating alternative dispute resolution (“ADR”) techniques into the litigation process. The Division has found that ADR can provide a valuable tool for resolving environmental disputes and achieving compliance with the Nation’s laws. When properly employed, ADR not only works, but it allows the Federal Government to pursue its environmental objectives — protecting the Nation’s health and welfare and preserving its natural resources — in an expeditious and cost-effective manner.

The Environment and Natural Resources Division

The Environment and Natural Resources Division (“ENRD”) represents the United States and its agencies in a broad spectrum of environmental and natural resources litigation in both federal and state courts. The Division consists of nine litigation sections denominated as the: (1) Appellate Section; (2) Environmental Crimes Section; (3) Environmental Enforcement Section; (4) Environmental Defense Section; (5) General Litigation Section; (6) Indian Resources Section; (7) Land Acquisition Section; (8) Policy, Legislation, and Special Litigation Section; and (9) Wildlife and Marine Resources Section. As their names suggest, the litigation sections handle matters ranging from enforcement of the federal environmental laws to disputes involving natural resources, wildlife, and Indian resources.

The breadth, diversity, and complexity of the Division’s docket provides varied opportunities to employ ADR techniques and ideally situates the Division to take on the challenge, embodied in the directives of the President and the Attorney General, to promote appropriate use of ADR techniques in civil litigation. *See* Executive Order 12988 §1 (c)(1)-(3); Order of the Attorney General, Promoting the Broader Use of Alternative Dispute Resolution Techniques, OBD 1160.1 (1995). Indeed, the ENRD was among the first of the Justice Department’s litigating Divisions to experiment with, and achieve beneficial results through, mediation. The Division learned from its experiences that well-designed and well-implemented ADR programs can offer litigants quality solutions to disputes. Additionally, ADR

can save time and attorney fees, increase public confidence in the courts, and save government resources and transaction costs.

ENRD policy on ADR

Assistant Attorney General Lois J. Schiffer, who manages the Environment and Natural Resources Division, has identified appropriate utilization of ADR techniques as one of the highest priorities of her tenure. As an experienced mediator, Lois Schiffer did not need to be won over to ADR concepts. She recognized, however, that to be a credible proponent of new techniques for resolving complex environmental disputes, the Division needed to change its litigation culture. Under her direction, the Division has adopted policies and procedures that have produced tangible results.

In 1995, the Environment Division issued a policy statement to encourage the use of ADR techniques in appropriate cases. The Division’s policy statement provides purposefully broad criteria to identify suitable cases for employing ADR, and directs all ENRD attorneys to use ADR techniques if those techniques provide an effective way to reach a consensual result that is beneficial to the United States. The ENRD policy statement, along with those of the other litigating components of the Department of Justice, is published in the Federal Register at 61 Fed. Reg. 36895 (1996). Rather than dictate that ADR should be used in certain cases, the ENRD policy envisions that attorneys will make well-counseled decisions concerning the appropriateness of ADR for specific cases or issues, regardless of which party in the litigation process proposes the idea. In July 2000, the Division issued a new directive that augments its ADR policy – the Policy on Use of Mediators for ADR (Directive 00-19). That directive establishes a uniform model ADR agreement and codifies the process for selecting and hiring mediators.

The Assistant Attorney General and her management team have also highlighted the importance of ADR by: (1) establishing regular internal reporting on the use of ADR; (2) publicizing “success stories” that illustrate how ENRD attorneys can take advantage of ADR processes; (3) providing extensive ADR training to

all attorneys whose practice is primarily civil; and (4) making ADR skills a part of an attorney's performance evaluation. In addition, ENRD attorneys are rewarded for results achieved through ADR. The Justice Department's annual awards for effective and important results on behalf of the United States in litigation now recognize efforts to resolve cases through ADR. Two awards are specifically earmarked for significant ADR achievements — the Attorney General's John Marshall Award for ADR and the Assistant Attorney General's Award for ADR. Those awards recognize that the Division measures the success of its ADR program by successful outcomes in individual cases, and not by the number of cases that are placed into ADR.

The ADR counsel

In recognition that ADR has become an important and permanent part of the Environment Division's litigation practice, Assistant Attorney General Schiffer has appointed an ENRD attorney, experienced in litigation and ADR, to serve as a full-time counsel for ADR matters. The ENRD Counsel for Alternative Dispute Resolution has primary responsibility to implement the Attorney General's order on ADR in ENRD cases. Among other things, the ADR Counsel works with individual attorneys to identify cases that are appropriate for ADR, to identify and select neutrals, and to implement ADR processes in those cases. The ADR Counsel also provides training to ENRD attorneys, works with client agencies to encourage and assist their efforts with ADR, and coordinates with other Divisions in the Justice Department, the United States Attorneys Offices, and the Justice Department's Senior Counsel for Dispute Resolution to exchange ADR information and expertise.

Why use ADR?

Conflict is inevitable. Prompt and efficient resolution is not. The resolution of legal disputes can be especially slow and costly in light of the rigid character and formality of judicial proceedings. Indeed, what is ostensibly the "main event" in judicial proceedings — the trial — frequently never occurs. More than 90% of ENRD cases settle, and more than 90% of all cases in district courts are resolved without a trial. Those

statistics suggest that, while the commencement of litigation and the specter of trial are useful in identifying the issues and determining the scope of the dispute, a trial is an exceedingly uncommon method for ultimately resolving disputes.

Despite the fact that most judicial cases settle before trial, the ENRD often encounters barriers when conducting unassisted settlement negotiations. Those barriers may include: (1) ineffective communication between the parties or between the opposing party and that party's attorney; (2) disagreement on the law, facts, and legal precedent; (3) insufficient facts or information; (4) emotional parties or counsel; and (5) unrealistic expectations of attorneys and parties concerning the risk of loss, experience at trial, or admissibility of evidence. ADR allows the use of a neutral third-party, such as a mediator, to identify and remove those barriers, enhancing the prospects for settlement. ADR techniques accordingly can provide an effective tool in litigation to help accelerate the resolution of cases that can be settled.

To use ADR effectively, however, one must understand the differences between mediated and adversarial negotiations. Unlike litigation or traditional bilateral settlement discussions, mediation frequently can and should involve participation by clients as well as their lawyers. In addition, because mediators are neutral and mediation is a confidential process, the parties should be prepared to engage mediators in candid and frank discussions. For those reasons, mediators can sometimes accomplish more than attorneys postured in an adversarial relationship. Here are some brief examples of what mediators can do:

- ! Mediators can package ideas and proposals and present them in a way so it is not "owned" by any side, reducing the reactive devaluation factor.
- ! Mediators can "reality test" the parties to help them appreciate the strengths, weaknesses, and limitations of litigation positions.
- ! Mediators can point out options to clients and attorneys that they fail to appreciate.

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- ! Mediators can improve the communication between the parties, between attorneys, and between parties and their own attorneys.
 - ! Mediators can assist the parties in exploring and developing creative alternatives to difficult problems.
 - ! Mediators can get information from both sides and discover the true interests of the parties and underlying disputes, which may lead to settlement of the case.
 - ! Mediators can guide the parties and counsel when negotiations get difficult.

Mediation also offers litigants added benefits, beyond the benefits derived from the use of a neutral, that would not be available in traditional negotiation or litigation. Litigants have more control over the process in an ADR forum than they do in court. In ADR, the parties select the neutral, design the process, decide the issues, interests, and alternatives to be explored and developed, and control the outcome. For that reason, the parties often achieve more comprehensive and lasting solutions that a court might be powerless to grant. Furthermore, because mediation is confidential, parties obtain better information upon which to evaluate options and make decisions. Because mediation enhances each party's appreciation of the other side's goals, interests, and legal arguments, it often stimulates them to explore and reach creative solutions affording mutual gain. Finally, working collaboratively empowers parties to improve and strengthen their relationship in future interactions.

What cases are appropriate for ADR?

In the Environment Division's experience, ADR can be an effective tool in a broad range of disputes. For that reason, the Division applies ADR across the spectrum of cases that the Division handles, rather than limiting its use to certain categories of cases or issues. The Division uses ADR not only in enforcement cases brought pursuant to the environmental laws, but also in cases involving natural resources, wildlife, and Indian resources. The Division encourages consideration of ADR as a routine matter when a collaborative process may benefit the case and enhance the settlement process.

Each of the Environment Division's civil litigation sections is successfully employing ADR techniques to achieve lasting solutions to difficult problems. The cases range from routine district court suits to Supreme Court litigation. Examples include:

- ! Complex, multiparty CERCLA cost recovery actions, which require enormous time and resources, and demand immediate steps to address environmental contamination.
- ! Inter-sovereign disputes, including a Supreme Court original action involving a 90-year old dispute among the Great Lake States over the diversion of Lake Michigan waters.
- ! Enforcement actions under the Clean Air Act seeking civil penalties and injunctive relief for emissions and permit violations under state implementation plans.
- ! Consolidated enforcement actions under section 10 of the Rivers and Harbors Act and sections 301 and 404 of the Clean Water Act.
- ! NEPA challenges to agency action, including a challenge to the Department of Energy's use of facilities at the Savannah River Site for storage of foreign research reactor nuclear spent fuel.
- ! Quiet title actions, including a dispute over rights of access through a national wildlife refuge.
- ! A century-old land dispute between the Navajo Nation and the Hopi Tribe over Native American lands in northern Arizona.
- ! Challenges to new air traffic procedures at metropolitan airports.
- ! NEPA and ESA challenges to land management practices in National Parks, including two opposing challenges concerning Channel Islands National Park, a challenge to a permit allowing grazing and hunting and a challenge to the resources management plan limiting grazing and hunting in the park.
- ! Challenges by Indian tribes to implementation of power sales contracts with utilities and industrial customers.

- ! Endangered Species Act cases brought by environmental groups about critical habitat designation.
- ! State and Indian tribe disputes about oil and gas royalties.
- ! Litigation concerning land acquisition for the Appalachian Trail in which mediation enabled the parties to achieve their common goal – to protect land from construction and development.
- ! Challenges to agency regulatory programs, including a challenge to BLM's program for adoption of wild horses and burros.

ADR techniques have proven especially helpful in disputes that require development of creative alternatives or flexibility in shaping relief (*e.g.*, the case is only one facet of a deeper dispute involving other issues that the court may not be able to address; or the relief that would satisfy the litigants is not in the power of the court to grant, but parties could independently agree to such settlement). ADR is also useful in cases in which the court's decision will not terminate the dispute, but rather lead to more or different litigation. In such cases, ADR participants can often develop a process to settle the whole dispute and not just the piece of it that is before the court. ADR can be used to narrow, simplify, or streamline the issues that must be presented to a court. Additionally, mediation may be effective when the government needs a swift resolution because an agency's programmatic needs cannot await the usual length of the litigation process (*e.g.*, the agency has an expensive project underway with contractual commitments or project deadlines that could be compromised by ongoing litigation). Most significantly, ADR offers a way to find out about and solve the real problems of the people involved – not just address the legal issues.

ADR is not the answer for every case

While ADR techniques should be considered in many civil cases, ADR is not the solution for every dispute. The Environment Division is especially sensitive to the limitations of ADR in circumstances implicating the United States' unique role in litigation. The Supreme Court said long ago, in a statement since chiseled on the walls

of the Justice Department, that a government lawyer "is a representative not of an ordinary party to a controversy, but of a sovereign whose obligation . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The United States may not be able to satisfy that obligation through a compromise solution when the dispute centers on questions of legal interpretation, official policy, or matters that implicate other broad public interests. When the government needs to set a precedent or preserve an issue for appellate consideration, when the government needs to establish a uniform rule of decision or a decisive interpretation of a statute to assist an agency in structuring its regulatory program, and when the government needs to deter unlawful conduct, the Environment Division may decide that litigation is the more appropriate course. ADR is a process and a tool to use in litigation, when appropriate, to attempt to reach a consensual result that is beneficial to the United States. However, it is not a panacea or the answer for every case.

Recent developments in ADR in the Federal Government

Congress, the Executive Branch, and the courts are all taking an active role in promoting ADR. For example, Congress, through the Administrative Dispute Resolution Act of 1996, made ADR a permanent component of the administrative process by requiring agencies to promulgate ADR policies, and authorizing all federal agencies to use alternative dispute resolution processes on a voluntary basis. On May 1, 1998, the President issued an ADR directive to the heads of all executive departments and agencies. That Executive memorandum creates an Interagency ADR working group, consisting of representatives of the Cabinet Departments and other agencies, to encourage federal agencies use of ADR. The Interagency ADR working group, chaired by Attorney General Reno, has established four sections that provide subject-specific ADR guidance and technical assistance to government agencies: Contracts and Procurement; Civil Enforcement; Workplace; and Claims Against the Government. On the judicial front, a significant number of federal courts have adopted ADR as an effective case management and docket management

tool. Circuit courts across the country have set up voluntary ADR programs that channel appellate cases to court-provided mediators for resolution before briefing or argument. In response, Congress enacted the Alternative Dispute Resolution Act of 1998, which effectively created a “multi-door” ADR program in every United States district court.

The role of the lawyer as problem solver

Abraham Lincoln instructed lawyers, in words that are especially relevant today, to “[d]iscourage litigation, persuade your neighbor to compromise where you can. Point out to them how the nominal winner is often the real loser . . . in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” ADR presents an opportunity for carrying that admonition into practice. If there are alternative avenues to resolve disputes in a way so that all adversaries are satisfied and “win,” the lawyer should utilize them rather than routinely promote the avenue which guarantees that at least one party, if not both, will lose. Attorney General Reno echoed that sentiment on Law Day when she called upon government attorneys to become problem solvers and peacemakers that work to “prevent conflict,” rather than let it “control us, or interfere with our mission of serving the American people.” To be an effective advocate and counsel, attorneys must not only master traditional litigation skills, but also hone settlement skills, including the effective use of ADR techniques.

ABOUT THE AUTHOR

Robin Lawrence is a trial attorney in the Policy, Legislation, and Special Litigation Section and serves as the Counsel for Alternative Dispute Resolution for the Environment and Natural Resources Division of the United States Department of Justice.^a

Federal EEO Update 2000 - What's New and What You Need to Know

*Michele E. Randazzo, Attorney-Advisor,
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Fiscal year 2000 has seen some significant changes in the Equal Employment Opportunity (EEO) area of federal employment law. As part of its EEO responsibilities, the Executive Office for United States Attorneys (EOUSA), Equal Employment Opportunity Staff (EEOS), has summarized below those changes which will most likely impact United States Attorneys' offices.

1. Newly revised 29 C.F.R. §1614

Perhaps the most broad-reaching change in the EEO arena has been the adoption of major revisions to 29 C.F.R. §1614, the Equal Employment Opportunity Commission's (EEOC) procedural regulations governing the administrative processing of EEO complaints filed by federal employees or applicants for federal employment. With limited exceptions, a federal employee who wishes to file an EEO complaint against his or her agency must first pursue that complaint through the administrative complaint process, prior to filing a court action. Employees asserting age discrimination claims under the Age Discrimination in Employment Act (ADEA) or gender-based wage discrimination claims under the Equal Pay Act (EPA) may file their claims directly in a court of competent jurisdiction, without first utilizing the administrative complaint process. *See* 29 C.F.R. §1614.201 and §1614.408. The provisions of 29 C.F.R. §1614 outline a detailed administrative process which federal agencies must follow in order to process EEO complaints. This process includes an agency investigation into allegations of employment discrimination, with the complaining employee retaining the right to request an EEOC hearing, or final agency decision without a hearing, after the agency investigation has been conducted.

In response to criticisms of the federal administrative complaint process, the EEOC revised its regulations last summer. These revised regulations, which took effect November 9, 1999, have had a significant impact upon the way in which federal agencies process EEO complaints. From the perspective of a United States Attorney's office, there are three notable changes.

- **Alternative Dispute Resolution**

While parties to an EEO dispute have always been encouraged to attempt to resolve the dispute without the necessity of extensive administrative processing, the EEOC now requires that federal agencies establish an Alternative Dispute Resolution (ADR) program that is available to EEO complainants at any stage in the administrative complaint process.

In accordance with this new requirement, EOUSA, through EEOS, has established an ADR program of mediation, through which collateral-duty mediators, who have successfully completed EEOS-sponsored mediator training, are available to parties in appropriate EEO cases.

It is important to note that the Department of Justice (DOJ), through the latest installment of DOJ Human Resources (HR) Order 1200.1, mandates that management participate, in good faith, in ADR where the complainant elects to pursue ADR. Management is not required, however, to settle the case.

Until the issuance of DOJ HR Order 1200.1, Chapter 4, Part 1, EOUSA would offer ADR, in the form of mediation, when both parties voluntarily agreed to submit the matter to mediation. Thus, the requirement that management participate in ADR when the complainant elects ADR represents a departure from the manner in which some Justice components, including EOUSA, have utilized ADR in the past.

In situations where an EEO complainant has requested ADR, management should bring any

objections to ADR to the attention of EEOS, and these objections will be considered. However, should EEOS determine that a particular case is appropriate for ADR, despite management's objections, DOJ HR Order 1200.1, Chapter 4, Part 1 requires that management representatives with settlement authority attend any ADR sessions and participate in good faith. *See* DOJ HR Order 1200.1, Chapter 4, Part 1, pages 4-1-15 - 4-1-16. This new section to DOJ HR Order 1200.1 was distributed to all United States Attorneys via electronic mail earlier this year, and can also be found on the DOJ website at <http://www.usdoj.gov/jmd/ps/chpt4-1.html>.

- **Finality of Administrative Judge decisions**

Under the pre-November 9, 1999, version of the EEOC's procedural regulations, decisions issued after a hearing by EEOC Administrative Judges were recommended decisions, and were thus advisory in nature. Upon receipt of an Administrative Judge's recommended decision, an agency was free to reverse or modify it.

With the exception of class complaints, which are still processed in the manner outlined above, a decision issued by an EEOC Administrative Judge under the revised provisions of 29 C.F.R. §1614 is now final. Both the agency and the complainant may appeal such a decision to the EEOC, Office of Federal Operations, but the agency no longer has the ability to essentially rewrite an Administrative Judge's decision. This is important because it has significantly changed the way in which agencies and employees view the impact of an EEOC hearing.

- **Sanctions**

One of the most significant criticisms of the federal EEO administrative complaint process is that it takes too long to complete. In response, the EEOC procedural regulations were revised so that EEOC Administrative Judges now have the ability to impose a wide range of sanctions against an agency if it fails to comply with the provisions of 29 C.F.R. §1614 or an Administrative Judge's order. These sanctions can include an ultimate finding in favor of the complainant on the merits of the case.

While the EEOC's procedural regulations have always contained deadlines for the completion of the several phases of the administrative process, the regulations did not provide Administrative Judges with significant enforcement authority in this regard. That is no longer the case.

Obviously, this sanction authority puts additional pressure upon EEO offices to ensure that administrative processing is completed within the time frames set forth in 29 C.F.R. §1614. To this end, the parties' cooperation in the administrative process, particularly with respect to the scheduling of on-site investigations and interviews, plays a large role in EEOS' ability to meet its obligations under 29 C.F.R. §1614.

One of the more frequent causes of delay in the administrative processing of an EEO complaint is that one or both parties elects to retain counsel or representation midway through the administrative process. To minimize such delay, parties are encouraged to make decisions regarding their legal representation at the earliest stage possible, and to promptly notify EEOS of such decision.

- **New Presidential Executive Orders**

In the past six months, President Clinton has issued several Executive Orders which impact federal employees in the EEO context. All Executive Orders can be viewed at the White House website, <http://www.whitehouse.gov/library/index.html>.

The first of these Executive Orders expands the bases of discrimination prohibited in federal employment. Now, in addition to race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation, and reprisal, federal employers may not discriminate against individuals on the following additional bases:

- **Executive Order 13145**

Issued February 8, 2000, this Executive Order prohibits discrimination in federal employment against employees, former employees, or applicants for employment, on the basis of "protected genetic information." Protected genetic information generally means information about an individual's genetic tests; information about the

genetic tests of an individual's family members; or information about the occurrence of a disease or medical disorder or condition in family members of an individual. Information about an individual's current health status is usually not considered protected genetic information unless it contains the information described above.

An individual asserting a claim of employment discrimination on the basis of protected genetic information under Executive Order 13145 may, in certain circumstances, also state a claim under the Rehabilitation Act of 1973 (Rehabilitation Act), as amended. Absent a viable Rehabilitation Act claim, Executive Order 13145 "does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its officers or employees, or any other person." In other words, unless an individual states a Rehabilitation Act claim based upon the agency's use of protected genetic information, the scope of relief available to that individual is limited to the filing of an administrative EEO complaint, with no further rights of appeal to the EEOC or federal court.

This is a complicated area, and one which will likely cause many questions in the future. As a starting point to answering some the questions that may arise, you should refer to the EEOC's Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information, which can be found at the EEOC's website, <http://www.eeoc.gov/docs/guidance-genetic.html>.

- **Executive Order 13152**

Issued May 2, 2000, this Executive Order prohibits discrimination on the basis of an individual's "status as a parent." Status as a parent refers to the status of an individual as a biological parent, an adoptive parent, a foster parent, a stepparent, a legal custodian, or one who is actively seeking legal custody or adoption of a child under the age of 18, or who is 18 or older but incapable of self-care due to a physical or mental disability.

Executive Order 13152 "does not confer any right or benefit enforceable in law or equity against the United States or its representatives."

Therefore, as with claims of sexual orientation discrimination or protected genetic information (that do not state independent Rehabilitation Act claims), an individual who believes that he or she has been discriminated against on the basis of that individual's status as a parent is limited to filing an administrative EEO complaint.

The Office of Personnel Management (OPM) is authorized to develop guidance on the provisions of Executive Order 13152, though no such guidance has yet been released .

The following Executive Orders address the issues of disability hiring and reasonable accommodation in the workplace:

- **Executive Order 13163**

Issued July 26, 2000, Executive Order 13163 requires federal agencies to increase their efforts to hire disabled individuals, with a goal of hiring 100,000 individuals with disabilities throughout the Federal Government over the next five (5) years.

Each agency is required to submit its plan to increase the opportunities for individuals with disabilities to be employed in the agency to OPM within 60 days from the date of the Executive Order. OPM is required to develop guidance on the provisions of this Executive Order.

- **Executive Order 13164**

Also issued July 26, 2000, Executive Order 13164 requires federal agencies to establish procedures regarding requests for reasonable accommodation. This Executive Order is similar to the Attorney General's Memorandum dated June 28, 1999, regarding the Hiring, Promotion, and Providing of Accommodations to Department of Justice Employees with Disabilities. At present, EEOS is drafting an EOUSA reasonable accommodations policy which complies both with the requirements of Executive Order 13164, and the Attorney General's June 28, 1999, memorandum. Once EOUSA's policy is finalized, it will be forwarded to the districts. The Department-wide policy must be submitted to the EEOC within one year from the date of the Executive Order.

Both the Americans with Disabilities Act of 1990 and the Rehabilitation Act, as amended, require employers to provide reasonable accommodations to those employees with physical or mental disabilities. The purpose of a reasonable accommodation is to allow a disabled individual to perform the essential functions of his or her job.

While Executive Order 13164 does not change in any way an employer's obligation to provide reasonable accommodations in appropriate circumstances, it does impose significant reporting and record keeping requirements. For instance, policies adopted pursuant to Executive Order 13164 should, at a minimum: set forth a clear procedure for the processing of accommodations requests; require employers to maintain a written record of accommodations requests and the disposition of such requests; and require that when an employer denies a request for accommodation, it must do so in writing, detailing the reasons for the denial.

- **Changes in the processing of sexual harassment claims**

EOUSA's sexual harassment prevention plan, first issued in 1994 and revised in 1998, established a "Point of Contact" (POC) program, whereby each district designates a trained Point of Contact for the reporting of allegations of sexual harassment in the workplace. EOUSA's plan was revised in June, 2000, so that allegations of sexual harassment against United States Attorneys are no longer reported to the district's POC, but to EOUSA, Legal Counsel's Office. Legal Counsel's Office will refer nonfrivolous allegations of sexual harassment against United States Attorneys to the Office of Inspector General (OIG), where appropriate. In cases of nonfrivolous allegations of sexual harassment made against other senior level management officials, the United States Attorney may, at his or her discretion, refer these cases to Legal Counsel's Office, which may refer such cases to the OIG, where appropriate.

- **Settlement of EEO cases**

In the past, parties attempting to settle EEO cases may have been limited by established personnel procedures or practices contained in

regulations implementing Title 5 of the United States Code or OPM guidelines.

On May 17, 2000, the EEOC issued a new chapter, Chapter 12, to its Management Directive 110, which provides guidance on the issue of settlement authority in EEO cases. Drafted in conjunction with OPM, Chapter 12 makes clear that there is broad legal authority under Title VII of the Civil Rights Act of 1964, the Rehabilitation Act, the ADEA, and the Equal Pay Act to effectuate settlement of employment discrimination cases.

Addressing such issues as back pay, lump sum settlements, cash settlements without corresponding personnel actions, and retirement concerns, Chapter 12 stresses that settlements of EEO complaints may include any and all remedies that a court could order, if the case were to go to trial. Parties to an EEO case who are involved in settlement negotiations should refer to Chapter 12 to the extent that there are questions about the agency's authority to agree to potential terms of settlement. Chapter 12 is also available at EEOC's website, as <http://www.eeoc.gov/federal/md110/chapter12.html>.

E. Conclusion

As the EEO landscape continues to evolve in application and scope to federal employment, the Equal Employment Opportunity Staff is available to answer any questions that you may have. Updates to the United States Attorneys' Manual to reflect the changes discussed in this article are in the process of being made. You may also obtain guidance from EOUSA's Legal Counsel's Office or Personnel Staff.

In addition, EEOS offers individualized training to United States Attorneys' Offices, upon request, on such issues as sexual harassment (or other employment discrimination) prevention training, the requirements of the Rehabilitation Act, and general training on the federal EEO complaint process. Please contact Virginia H. Howard, Acting Assistant Director, or Michele E. Randazzo, Attorney-Advisor, EEOS, for further guidance or assistance in this area. ~

ABOUT THE AUTHOR

' Michele E. Randazzo joined the Department of Justice after seven years in private practice in Boston, Massachusetts, where she specialized in labor and employment issues, particularly state and federal court employment-related litigation.**a**

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